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No. _____

In The Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether counsel's misfeasance during state post-conviction proceedings can serve as "cause" for the procedural default of a habeas claim, when the attorney error does not itself present a valid habeas claim.

Whether a federal habeas court may order a retrial, rather than a new state-court appeal, after granting a habeas petition based solely on grounds of ineffective assistance of appellate counsel.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Laurence Mack, Warden, respectfully petitions for a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The final opinion of the court of appeals reversing the district court and ordering the district court to issue a writ of habeas corpus conditioned on a new criminal trial in state court (Pet. App. 1a-11a) is unreported. The original opinion of the court of appeals affirming the district court (Pet. App.

14a-22a) is unreported. The opinion of the district court (Pet. App. 23a-26a) is unreported. The two reports and recommendations of the magistrate judge (Pet. App. 27a-44a) are unreported. The opinion of the Ohio Supreme Court (Pet. App. 45a-46a) is reported at 76 Ohio St. 3d 270, 667 N.E.2d 390. The opinion of the Ohio court of appeals (Pet. App. 47a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1999. The court of appeals denied a petition for rehearing on August 19, 1999. Pet. App. 12a-13a. On November 12, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including January 16, 2000. (App. No. 99A410.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Relevant provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, 28 U.S.C. 2254(b)(1), provide:

§ 2254. State custody; remedies in Federal courts

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(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

4. Rule 26(B)(1) of the Ohio Rules of Appellate Procedure provides in relevant part: "A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

INTRODUCTION

This petition presents an issue closely related to the issue now before the Court in *Edwards v. Carpenter*, No. 98-2060 (scheduled for oral argument on February 28, 2000). Thus, it would be appropriate for this Court to defer consideration of this petition until the issuance of its decision in *Edwards*, and then consider whether to dispose of this petition by issuing a summary order reflective of *Edwards*. At this juncture, we can anticipate that such a summary order might take one of two forms: *either* an order vacating the judgment below and directing the Sixth Circuit to reconsider

its decision in light of the holding and principles articulated in *Edwards*, or an order reversing and remanding the Sixth Circuit's judgment for the additional reason that the Sixth Circuit's erroneous decision on the *Edwards*-related issue in *this* case was predicated on a further serious error of federal habeas law.

Edwards and this case share the following issue in common: whether attorney misfeasance that is *not* independently cognizable as a federal habeas claim may nonetheless serve as "cause" for the procedural default of a habeas claim. To be sure, this common question arises in different specific contexts. In *Edwards*, the attorney misfeasance that the prisoner points to as the cause for his default is not independently cognizable because he also procedurally defaulted the ineffective-assistance claim itself. Here, the attorney misfeasance that the prisoner offers as the cause for his default is not independently cognizable because the attorney error occurred during state post-conviction proceedings, where there is no Sixth Amendment right to counsel at all. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

While the Court has never suggested that state prisoners enjoy a constitutional right to the assistance of counsel in post-conviction proceedings, we recognize that some prisoners have argued that "there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) (declining to "answer this question broadly"). As far as we are aware, every post-*Coleman* circuit court that *has* addressed that question, however, has declined to create such an exception to *Finley* and

Giarratano. Though the Sixth Circuit did not expressly address the question in this case – and has not done so in any of its previous decisions – that question could be presented and resolved here.

We respectfully suggest, however, that the more appropriate disposition of this petition might be an order remanding the case once the Court issues its decision in *Edwards*. Though the court of appeals could have addressed whether the possible exception noted in *Coleman* should be recognized in the Sixth Circuit, the court did not do so. Instead, it simply assumed – quite erroneously – that attorney misfeasance in a post-conviction proceeding may constitute "cause" for a procedural default, regardless of whether that post-conviction proceeding was the first place where the prisoner could have raised his constitutional claim. That decision goes way too far, and, as the dissenting judge on the panel noted, Pet. App. at 7a, actually conflicts with this Court's decision in *Coleman*, where the Court "reiterate[d] that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." *Coleman*, 501 U.S. at 755.

The Sixth Circuit's mistaken assumption in this case is precisely analogous to the mistake it made in *Edwards*. In both cases, the court of appeals allowed attorney misconduct to excuse a prisoner's procedural default without first determining whether the attorney misconduct itself presented a proper basis for habeas relief. For this reason, we believe that an appropriate disposition of this petition would be a remand in light of *Edwards*. On remand, the Sixth Circuit may address for the first time the issue left open in *Coleman*, along with any other issues unresolved by *Edwards* itself.

STATEMENT

1. State court proceedings. Respondent David L. Paris was convicted and sentenced by an Ohio trial court in 1991 for the crime of felonious assault. The charge stemmed from the beating of Paris's two-year-old stepson, who had been struck with a belt, a flashlight and fists. After a jury found Paris guilty of the crime, the state trial court sentenced him to a prison term of eight to fifteen years.

Paris appealed (through counsel), alleging that the evidence presented at his trial warranted a jury instruction only on the crime of assault, rather than instructions on that crime and the more serious crime of felonious assault, both of which were explained by the trial court to the jury at Paris's trial. The Ohio court of appeals affirmed, however, *see* 1992 WL 63387 (March 26, 1992), and Paris did not appeal this decision to the Ohio Supreme Court.

On July 1, 1993, Rule 26(B) of the Ohio Rules of Appellate Procedure took effect. The relevant portion of that rule is reproduced on page 3 of this petition. The Ohio Supreme Court adopted that rule after holding that in Ohio, a claim of ineffective assistance of *appellate* counsel must be raised not in a state trial court, but rather through an application for reconsideration filed in the state court of appeals. *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). The 1993 rule, which still governs ineffective-assistance-of-appellate-counsel claims in Ohio, gives criminal defendants 90 days – starting with the date on which the court of appeals files its judgment in the defendant's original state-court direct appeal – to raise such ineffective-assistance claims.

On August 10, 1995 – over two years after the new 90-day rule took effect – Paris (through new post-conviction counsel) filed a Rule 26(B) ineffective-assistance-of-appellate-counsel claim with the Ohio court of appeals. Paris alleged that his appellate counsel in his original appeal in 1991-92 had provided ineffective assistance by failing to challenge the trial court's admission at trial of certain out-of-court statements by a four-year-old witness. (The trial court had admitted those out-of-court statements after concluding that they fell within the excited-utterance exception to Ohio's hearsay rule.)

The state court of appeals did not reach the merits of Paris's Rule 26(B) application, however, and thus did not decide the merits of his ineffective-assistance argument. Instead, the court dismissed the application on October 23, 1995, finding that Paris had missed the 90-day window for filing such a claim under Rule 26(B). Pet. App. 48a-49a.[1] The appeals court found that Paris's reason for filing a late request to reopen his direct appeal – the heavy workload of his post-conviction counsel – was not "good cause" for his untimely application in 1995. Pet. App. 49a. (Paris had evidently asked the Ohio public defender's office to represent

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[1] The state court of appeals' October 1995 opinion faults Paris for not filing his Rule 26(B) application within 90 days after that court's original March 26, 1992 judgment that affirmed Paris's conviction in his direct appeal. In fact, Rule 26(B)'s 90-day requirement did not take effect until July 1, 1993 – more than a year after that original state-court judgment in Paris's direct appeal. Paris was therefore actually obligated to comply with Ohio's former Appellate Rule 26 in 1992. *See State v. Reddick*, 72 Ohio St. 3d 88, 90, 647 N.E.2d 784, 786 (1995). In any event, Paris's August 22, 1995 application for reopening of his direct appeal was untimely under both the former and current versions of Ohio's Appellate Rule 26.

him in state post-conviction proceedings in July, 1992, after learning that month that he had lost his direct appeal four months earlier. The state public defender's office took no action on Paris's behalf until three years later, when one of its lawyers filed the untimely Rule 26(B) application.)

Paris appealed, but the Ohio Supreme Court affirmed the dismissal of his Rule 26(B) application without reaching the merits of the ineffective-assistance-of-appellate-counsel claim. Like the state court of appeals, the Ohio Supreme Court found that Paris had simply missed the deadline for raising such a claim in Ohio's courts. *State v. Paris*, 76 Ohio St. 3d 270, 667 N.E.2d 390 (1996) (*per curiam*). Pet. App. 45a-46a. The Ohio Supreme Court's one-line order reads simply: "We affirm the judgment of the court of appeals for the reasons stated in its decision. *See State v. White* (1995), 72 Ohio St. 3d 91, 647 N.E.2d 787." The reference to *White* makes clear that the state supreme court, like the court of appeals, never addressed the merits of Paris's ineffective-assistance claim, and dismissed the Rule 26(B) application solely on state procedural grounds. In *White*, the court had declined to reach the merits of an ineffective-assistance claim where the prisoner – citing his post-conviction counsel's heavy workload as the cause for his delay – had missed the Rule 26(B) filing deadline, just like Paris.

2. Federal habeas proceedings. On October 21, 1996 (soon after the effective date of AEDPA), Paris filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in federal district court. He alleged only one ground for habeas relief: the ineffective-assistance of his appellate counsel in violation of the Sixth and Fourteenth Amendments.

A U.S. magistrate judge determined that Paris had procedurally defaulted his ineffective-assistance claim by

failing to comply with Ohio's procedural rule, Rule 26(B), for raising such a claim. Pet. App. 31a. Searching for the cause of that default, the magistrate judge noted that Paris's lawyer on direct appeal never told Paris about the judgment in that direct appeal, and Paris did not learn that he had lost the appeal until roughly 120 days after the state appellate court issued that judgment – well beyond the 90-day window for raising a post-conviction challenge to appellate counsel's effectiveness under Rule 26(B). Were that the sole reason for Paris's late Rule 26(B) filing, he would have shown cause for his default of the ineffective-assistance claim, said the magistrate judge. *Id.* at 31a.

However, Paris's reason for the additional three-year delay once he *did* learn of the judgment in his direct appeal could not serve as cause for the default. That reason – the heavy workload of Paris's post-conviction counsel – could not excuse the late Rule 26(B) filing, said the magistrate judge, since Paris had no right to counsel at all in mounting a collateral attack on his conviction. And, according to the magistrate judge, Rule 26(B)'s deadline for raising ineffective-assistance-of-appellate-counsel claims in Ohio's state courts is an adequate and independent ground that bars federal habeas review of defaulted ineffectiveness claims. *Id.* at 42a.

The district court adopted the magistrate judge's recommendations in full on August 22, 1997, dismissing Paris's ineffective-assistance claim (and therefore his entire habeas petition) because he had procedurally defaulted that claim in state court, and could not show cause for the default. As had the magistrate judge, the district court concluded that the failure of Paris's counsel in his direct appeal to notify him of the state appellate court's judgment could have excused Paris's failure to meet Rule 26(B)'s 90-day deadline had

Paris raised his ineffective-assistance claim in state court "as soon as he discovered that his initial appeal had been denied." *Id.* at 25a. But the additional three-year delay between Paris's discovery that he had lost his direct appeal and the filing of his Rule 26(B) application in Ohio's state courts could not likewise be excused, said the district court, particularly where the Ohio Supreme Court had earlier held in the *White* case that "a delay occasioned by the heavy workload of counsel does not constitute good cause for a delay in filing a motion to reopen" under Rule 26(B). *Id.* at 25a.

Paris appealed. On March 3, 1999, in its original decision, the court of appeals affirmed the judgment, finding that Ohio's Rule 26(B) posed an adequate and independent state ground barring habeas relief in Paris's case because he had failed to comply with the Ohio rule's 90-day time limit, and could not point to the tardiness of post-conviction counsel as cause for the delay. *See id.* at 21a ("Attorney error cannot constitute cause when the error resulted in a petitioner's default in a proceeding in which he was not constitutionally entitled to counsel."). Like the district court, the court of appeals agreed that Paris could have shown cause for the default of his habeas claim had he promptly filed a Rule 26(B) application in the Ohio court of appeals once he learned of that court's judgment, but by turning his case over to new post-conviction counsel and letting those new lawyers wait three years before filing the application, Paris lost any chance of showing cause for his default. Because Paris had no right to counsel in a collateral attack on his conviction, "he bore the burden of complying with the procedural requirements of Rule 26(B). Paris sought and awaited discretionary counsel at his own peril." *Id.* at 22a. The court of appeals therefore unanimously affirmed the dismissal of Paris's habeas petition.

Paris next filed a petition for rehearing in the court of appeals. On May 26, 1999, the court of appeals granted that petition, vacating the March 3rd opinion and issuing a new order in its place. That new opinion – an unsigned order joined by Judges Merritt and Cole – concluded that Paris *could* show cause for his default in state court, because his original appellate lawyer in the direct appeal was "incompeten[t]" in 1992, and because there had been a "backlog at the Ohio Public Defenders Office" from 1992 until 1995. *Id.* at 6a.

On the performance of Paris's lawyer in the direct appeal, the court of appeals faulted that lawyer for his "fail[ure] to communicate to his client how to proceed with further appeals," and for giving Paris "no guidance on how to further appeal" once the state court of appeals affirmed Paris's conviction in March, 1992. *Id.* at 5a-6a. As for the state public defender's office, the Sixth Circuit concluded that Paris had relied on the lawyers in that office to file his Rule 26(B) post-conviction application, and could not be faulted for that new counsel's three-year tardiness in doing so. "[I]t would be unjust to blame a layman such as Paris for the backlog at the Ohio Public Defender's Office. They did not inform him that he was in danger of procedural default and as a layman it would not be evident to him that his claim might procedurally expire in the hands of the Public Defender." *Id.* at 6a.

And not only was there cause for Paris's default of his habeas claim, but he could also show prejudice, said the court of appeals, for his appellate lawyer in the direct appeal should have challenged the admission of a hearsay statement at Paris's trial. *Id.* at 6a. But rather than granting a writ of habeas corpus conditioned on the reinstatement of Paris's

direct appeal, the Sixth Circuit ordered the district court to issue the writ "giving the state a reasonable time to retry the petitioner." *Id.*

Judge Farris dissented, arguing that Paris had shown neither cause for, nor prejudice from, his state-court procedural default. On the cause issue, Judge Farris observed that "[a]fter Paris's direct appeal was denied, he had no right to counsel." *Id.* at 7a. "Therefore, the fact that after this point (1) Paris's attorney failed to communicate with him, and (2) the Public Defender was too busy to press his post-conviction claim for more than three years, cannot satisfy the legal definition of cause. Under these circumstances, Paris cannot claim that a bad lawyer is worse than no lawyer at all." *Id.* at 7a. As for the prejudice flowing from Paris's default, Judge Farris found that the majority had "improperly substitute[d] its judgment for that of the [state] trial court" on the hearsay question. He would have found the state trial court's resolution of the evidentiary issue "not unreasonable," and therefore would not have faulted Paris's appellate lawyer for not raising that issue in the direct appeal. *Id.* at 10a.

Judge Farris also disagreed with the relief ordered by the majority. Given that Paris's habeas petition alleged that he had been denied the effective assistance of counsel in his direct *appeal* in Ohio's state courts, "a more appropriate remedy would be to require the state to allow an out-of-time post-conviction appeal," thereby giving Paris the very relief he sought in his untimely Rule 26(B) application in the state courts, and in his habeas petition in federal court. *Id.* at 11a.[2]

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[2] Paris was paroled on July 2, 1998 while his appeal was pending before the court of appeals. This case is not moot, however, because he was "in custody" at the time he filed his federal habeas petition in 1996, and the federal courts therefore retain jurisdiction

3. The *Edwards* case. This case is closely tied to the pending *Edwards v. Carpenter* case, No. 98-2060, which is scheduled for argument on February 28, 2000. That case, like this one, comes from the Sixth Circuit (and from Ohio), and indeed Judge Merritt served on the panel in both the case below and in the Sixth Circuit's decision in *Edwards*, which is reported at 163 F.3d 938. As explained in the Introduction, the disposition of this petition should follow the Court's decision in *Edwards*, for both cases concern a prisoner's default under Ohio's Appellate Rule 26(B), and in both, the court of appeals allowed claims of attorney error to excuse that state-court procedural default, even though the attorney error in both cases did not itself present a valid habeas claim.

REASONS FOR GRANTING THE PETITION

The court of appeals, despite this Court's express decisions holding otherwise, has created a new constitutional right to the effective assistance of counsel in state post-conviction proceedings, and has for the first time allowed the errors of post-conviction counsel to excuse in federal habeas a prisoner's failure to comply with a State's independent and adequate procedural rule for presenting post-conviction claims in state court. Badly misreading and misapplying this Court's precedents of the past two decades, the court of appeals has opened a new avenue for state prisoners to secure federal review of defaulted claims, despite the failure of their state post-conviction lawyers to comply with state procedural rules.

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to decide his case and any subsequent appeals. *See Spencer v. Kemna*, 118 S. Ct. 978, 983 (1998); *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968).

That decision will allow prisoners (and their post-conviction lawyers) to flout the States' rules, and then run to federal court and there raise the defaulted claims anew, despite having "deprived the state courts of an opportunity to address those claims in the first instance." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). The court of appeals has, in short, reached the merits of a federal constitutional claim in habeas that this Court could not reach on direct review, for undeniably Ohio's state courts dismissed the claim in this case on state procedural grounds without addressing the claim's merits. No other court of which we are aware has previously suggested that the missteps of state-court post-conviction counsel can revive a claim that was defaulted during a prisoner's collateral attack on his conviction – when he had no right to a lawyer at all – and surely this Court has never done so (although some prisoners, like the one in *Coleman*, have pushed for such a rule).

Though David Paris, the habeas petitioner in this case, procedurally defaulted his ineffective-assistance-of-appellate-counsel claim – by raising it too late under Ohio's procedural rules – and though that same claim attacking the work of his *appellate* lawyer is the only one that he later raised in his federal habeas petition, the court of appeals has sent his case back to square one in the state *trial* court. That decision "ignores the State's legitimate reasons for holding the prisoner," and, if left to stand, "offers state prisoners whose custody [i]s supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U.S. at 731-32. Review by this Court is therefore warranted, for the decision of the court of appeals runs counter to this Court's own long-settled precedents, and is also inconsistent with the approach followed by every other court of appeals that has considered

whether errors by post-conviction counsel can serve as cause for a procedural default as well.

1. The Sixth Circuit's inconsistency with *Coleman*. No one disputes that the States are permitted to enforce a host of procedural rules to regulate their criminal trials and appeals. As the Court has said, such rules "serve vital purposes at trial, on appeal, and on state collateral attack," *Murray v. Carrier*, 477 U.S. 478, 490 (1986), for they "channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984).

And all can agree as well that federal habeas petitioners who have not complied with those State rules may nonetheless secure federal habeas review of a constitutional claim by showing both "cause" for and "prejudice" from the procedural default as described in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and its progeny. Even further, the Court has already held that constitutionally ineffective assistance of counsel may serve as cause for the procedural default of a habeas claim. *See Carrier*, 477 U.S. at 489 ("a claim of ineffective assistance . . . may be used to establish cause for a procedural default").

But the Court has never said, as did the court of appeals in this case, that attorney error may serve as the cause for a procedural default when the prisoner had no constitutional right to the effective assistance of counsel at all. Indeed, this Court has said just the opposite. *See Coleman*, 501 U.S. at 754 ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as *Carrier* says explicitly.").

An Ohio Appellate Rule 26(B) application is a "civil, post-conviction matter," *see State v. Robinson*, 74 Ohio St. 3d 1518, 660 N.E.2d 472 (1996), and in keeping with the text of the Sixth Amendment itself (guaranteeing accused persons the assistance of counsel in "all criminal prosecutions"), this Court has long-since rejected the argument that state prisoners are entitled to the assistance of counsel in civil, post-conviction proceedings. *See Coleman*, 501 U.S. at 755; *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality opinion); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

The court of appeals' approach is squarely at odds with those decisions, and simply cannot be reconciled with *Coleman* in particular, where, as here, the state prisoner argued "that it was his attorney's error that led to the late filing of his state habeas appeal." *Coleman*, 501 U.S. at 752. Rejecting that argument, the Court explained that because "[t]here is no constitutional right to an attorney in state post-conviction proceedings . . . this case is at an end," for "counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation." *Id.* at 752, 755. That is, the very argument advanced by the prisoner here and adopted by the court of appeals – that the errors of state post-conviction counsel may excuse a prisoner's procedural default in state court – was expressly rejected by the Court in *Coleman*.

While this Court declined in *Coleman* to "answer . . . broadly" the question whether there is a right to counsel in those post-conviction proceedings that offer a prisoner his *first* opportunity to raise a constitutional claim in state court, *Coleman*, 501 U.S. at 755, and while other courts of appeals that have addressed that question have uniformly declined to

create any such exception to *Finley*,[3] the court of appeals in this case never even considered the question reserved in *Coleman*, and instead ruled contrary to the holding of *Coleman* itself, for the court of appeals' opinion suggests that *any* workload-induced errors of post-conviction counsel can excuse a state-court procedural default, whether the prisoner enjoyed earlier state-court opportunities in his direct appeal to raise the claim or not.

Indeed, though the court of appeals relied on *Coleman* in its original opinion rejecting Paris's habeas claim, and though Judge Farris likewise cited *Coleman* in his dissenting opinion, the court of appeals' final opinion fails to mention *Coleman* at all. In holding that "it would be unjust to blame a layman such as Paris for the backload at the Ohio Public Defender's Office," Pet. App. 6a, and in concluding that a federal habeas court could review Paris's defaulted claim despite his failure to "abide[] by the time limitations set forth in Ohio App. Rule 26(B)," *id.* at 4a, the court of appeals simply ignored this Court's language in *Coleman*: "Attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error [that results in a procedural default].'" *Coleman*, 501 U.S. at 753, quoting *Carrier*, 477 U.S. at 488. "Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute

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[3] *See, e.g., Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1100 (1998); *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992); *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993); *Hill v. Jones*, 81 F.3d 1015, 1025-26 (11th Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997).

cause to excuse the default in federal habeas." *Coleman*, 501 U.S. at 757.

Apparently, all a federal habeas petitioner need do now in Ohio – and in the other states in the Sixth Circuit that likewise enforce procedural rules for raising habeas claims in state court – is ask an overworked post-conviction lawyer to handle his case once the direct appeal is over. By doing so, the prisoner no longer need comply with any state deadlines for raising post-conviction claims, for the Sixth Circuit will evidently now always excuse any post-conviction defaults when counsel is burdened by a "heavy workload." That decision ignores the States' "important interest in finality," *Coleman*, 501 U.S. at 750, and surely shows none of "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.* at 726.

2. The contrary precedent of other courts of appeals. No other court of appeals has allowed an attorney error that does not itself rise to a Sixth Amendment violation to serve as cause for a procedural default, nor allowed the errors of post-conviction counsel to excuse the procedural default of a habeas claim in state court. Indeed we have found no other decision agreeing with the Sixth Circuit's analysis of this important issue of habeas procedure, and that is hardly surprising in light of *Coleman*. *See, e.g., Burks v. Dubois*, 55 F.3d 712, 717 (1st Cir. 1995) ("Mere attorney error, not amounting to ineffective assistance in a constitutionally significant sense . . . is insufficient to constitute cause."); *Weeks v. Angelone*, 176 F.3d 249, 273 (4th Cir. 1999) ("For an attorney error to constitute cause . . . a petitioner must first possess a constitutional right to assistance of counsel, [and] . . . a petitioner has no constitutional right to assistance of counsel in state habeas

proceedings."), *cert. granted in part on other issues*, 120 S. Ct. 30 (Sept. 1, 1999) (No. 99-5746); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999) ("The law is well-established . . . that such error [by state post-conviction counsel] committed in a post-conviction application, where there is no constitutional right to counsel, cannot constitute cause."), *cert. denied*, 120 S. Ct. 29 (1999); *Steward v. Gilmore*, 80 F.3d 1205, 1212 (7th Cir. 1996) ("Ineffective assistance of postconviction counsel is not itself a cognizable federal constitutional violation and may not serve as cause for a procedural default."); *Rehbein v. Clarke*, 94 F.3d 478; 484 (8th Cir. 1996) ("it is now well settled that there is no constitutional right to an attorney in state postconviction proceedings. . . . [so] even if Rehbein's postconviction counsel was ineffective . . . Rehbein has failed to demonstrate adequate cause for his procedural default"); *Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) (rejecting claim that a procedural default was caused by the ineffective assistance of counsel in a post-conviction proceeding, because ineffective assistance can "only constitute cause if it amounts to an independent constitutional violation," and "there is no constitutional right to an attorney in a state or federal habeas proceeding"), *cert. denied*, 119 S. Ct. 1777 (1999); *Demarest v. Price*, 130 F.3d 922, 941 (10th Cir. 1997) ("ineffective assistance of counsel in the post-conviction proceedings does not constitute cause under federal law"); *Tower v. Phillips*, 7 F.3d 206, 211 (11th Cir. 1993) ("an attorney's failure to institute timely collateral proceedings cannot excuse a procedural default").

And, like the Ohio Supreme Court, which has rejected the argument that the heavy workload of a state public defender's office can excuse a prisoner's procedural default in state post-conviction proceedings, *see State v. Wilson*, 80 Ohio St. 3d 132, 134, 684 N.E.2d 1221, 1222 (1997) ("[t]hat

counsel was 'busy' with other cases does not constitute good cause for the delayed filing"), so federal courts have likewise dismissed that excuse as the cause for a state-court procedural default. *See Fairman v. Anderson*, 188 F.3d 635, 643 (5th Cir. 1999) (where post-conviction counsel "failed to act or otherwise inadvertently allowed deadlines to pass," the habeas petitioner "demonstrates no external impediment – necessary to show 'cause' – that prevented his counsel from constructing or raising his claims"); *Tredway v. Farley*, 35 F.3d 288, 295-96 (7th Cir. 1994) (describing the heavy-workload-as-cause excuse as "squarely foreclosed"), *cert. denied*, 513 U.S. 1129 (1995); *Bannister v. Delo*, 100 F.3d 610, 624 (8th Cir. 1996) ("post-conviction counsel's case load, which allegedly was heavy and prevented him from devoting more time to this case . . . [does] not establish[] cause"), *cert. denied*, 521 U.S. 1126 (1997).

In short, the court of appeals has departed from the uniform course set by this Court and followed by all other lower courts in the wake of *Coleman*. Though "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it," *Coleman*, 501 U.S. at 751 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)), that principle will now mean little in the Sixth Circuit when the States there try to set deadlines for the "timely assertion" of habeas claims in state court. Such an expansive view of federal habeas power – a view so at odds with this Court's express decisions to the contrary – undercuts the States' authority to enforce their procedural rules, and tramples on the "concerns of comity and federalism . . . [that underlie] the independent and adequate state ground doctrine." *Coleman*, 501 U.S. at 730.

3. The relief ordered by the court of appeals. Not only is the court of appeals' decision so clearly erroneous on the merits, but the remedy ordered by the court is likewise unwarranted. Though Paris alleged in his habeas petition only that he had been denied the effective assistance of appellate counsel (because he claims that the lawyer who handled his direct appeal ought to have raised a particular issue, but did not), the Sixth Circuit has granted the habeas writ conditioned on a state-court *retrial* of Paris. Even if a federal habeas court can review Paris's defaulted ineffective-assistance claim, and even if that claim has merit, the relief granted by the court of appeals – relief that forces the State to go to the much greater expense and burden of retrying him – seems inappropriate when all that he sought in federal court was a fresh opportunity for a state-court appeal. *See* James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, Vol. 2, § 33.4 n.2 and cases cited therein (3rd ed. 1998).

Yet again, then, the court of appeals has shown its low regard for state court procedures, for even if Paris has properly presented a valid ineffective-assistance-of-appellate-counsel claim to the federal courts, the state court of appeals is surely entitled to review the merits of the claim that Paris never presented in his direct appeal due to his counsel's alleged errors there. By reviewing not just the merits of the ineffective-assistance claim itself, but also the merits of the claim that Paris's lawyer failed to raise in the state court of appeals, the Sixth Circuit has once more "deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 732.

4. The disposition of this petition. For the foregoing reasons, there is no doubt that the court of appeals committed plain error in this case. The court simply assumed

that misfeasance by post-conviction counsel could serve as "cause" for a procedural default, even though the prisoner has no Sixth Amendment right to post-conviction counsel at all. This assumption, however, is unambiguously contradicted – as the dissent below observed – by this Court's decisions in *Carrier* and *Coleman*, which held that attorney error cannot serve as the cause for a procedural default unless the attorney error qualifies as a Sixth Amendment violation. Because of this plain error, this case warrants a summary order from this Court reversing the Sixth Circuit's decision.

This summary reversal is warranted even considering the issue left open in *Coleman* about whether prisoners enjoy a Sixth Amendment right to counsel in post-conviction proceedings when collateral review offers them their first opportunity to raise particular constitutional claims, such as ineffective-assistance-of-appellate-counsel. Because the court of appeals did not even address this question at all, but instead erroneously assumed that it did not matter for "cause" purposes whether the misconduct of post-conviction counsel qualifies as a Sixth Amendment violation, the court's decision should be vacated. On remand, the court of appeals can address the issue left open in *Coleman* about a possible exception to *Finley*. Indeed, an order from this Court directing the court of appeals to consider that question might well be appropriate, for just as other courts of appeals have addressed that question, the court below could and should have done so here.

But because the court of appeals' plain error in this case is so closely related to its equivalent error in *Edwards* – in both cases the court of appeals allowed attorney misfeasance to excuse a state-court default, even though the attorney misfeasance could not itself serve as an independent basis for federal habeas relief – a decision on this petition

should be postponed pending the outcome of *Edwards* itself. If this Court adopts in *Edwards* the analysis we have advocated there – including the basic principle that *a federal habeas court should not let attorney misconduct serve as cause for a procedural default unless the state courts could or should have granted relief for the attorney misconduct itself* – then it would be appropriate for the Court to remand this case to the court of appeals for further consideration in light of *Edwards*. In any event, this Court will be in a better position, after having resolved *Edwards*, to judge exactly what order would be most appropriate in this case.

CONCLUSION

The petition should be held pending this Court's decision in *Edwards v. Carpenter*, No. 98-2060, and then the Court either should vacate the judgment in this case and remand for further proceedings in light of *Edwards*, or should reverse and remand for further consideration consistent with this Court's previous decisions in *Carrier* and *Coleman*.

Respectfully submitted,

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January 2000

(2) Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOTICE: THIS IS AN UNPUBLISHED OPINION

No. 97-4129

DAVID PARIS,
Petitioner-Appellant,

v.

MELODY TURNER, WARDEN
Respondent-Appellee.

Argued: November 6, 1998

Decided and Filed: May 26, 1999

Before: MERRITT, COLE, and FARRIS, [FN*] Circuit Judges.

FN* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and upon review of the petition by the original hearing panel, the panel grants the petition to rehear, vacates and sets

aside the original decision and issues a new decision as follows:

David Paris appeals the district court's dismissal of his habeas corpus petition in which he challenges his 1991 conviction for felonious assault by contending that he received ineffective assistance of counsel on direct appeal. The District court dismissed the petition on grounds of procedural default, finding that Paris failed to file his ineffective assistance claim within the ninety-day deadline set forth by Ohio App. R. 26(B). For the reasons that follow, we REVERSE the judgment of the District Court.

On June 21, 1991 Paris was convicted of assaulting Darius Walker, a young boy. Paris appealed his conviction to the Ohio Court of Appeals and, because he was indigent, received appointed counsel. Paris's appointed counsel, Stephen Schutte, filed a brief which contained a short five-paragraph argument that failed to address what Paris contends was his meritorious ground for appeal: the trial court's admission of the out-of-court statements of a four-year-old declarant without conducting a voir dire hearing to determine competence. Keisha Walker, the four-year-old sister of Darius, made the out-of court statements in question at approximately 11:37 a.m. on September 17, 1990. This was thirteen hours after the alleged assault of Darius Walker. During these thirteen hours, Keisha had slept, awoken, and spent several hours with her babysitter. Keisha's out-of-court statements were admitted pursuant to the excited utterance exception to the hearsay rule. In order for the excited utterance exception to apply, it must be established that the exciting influence had not lost its sway over the faculties of the declarant before the making of the statement. After thirteen hours we think that the startling event of the assault of her brother had lost its dominion over Keisha's reflective

faculties. *See, Potter v. Baker*, 162 Ohio St. 488, 496 (1955). In addition, Keisha's statement was not an unreflective one as it is required to be to qualify as an excited utterance under Ohio law. *Id.* at 495-96. Keisha had not said anything about the incident until questioned by two paramedics who arrived at her home. The United States Supreme Court has recognized that children are susceptible to suggestion during questioning and that unless the circumstances of a child's questioning carry sufficient particularized guarantees of trustworthiness to establish the absence of suggestion, the Confrontation Clause bars admitting children's hearsay answers into evidence. *Idaho v. Wright*, 497 U.S. 805, 813 (1990). After answering the paramedics questions, Keisha was taken to the hospital where she was interrogated by three individuals who recounted her answers at trial. Keisha's statements to these individuals were admitted pursuant to the excited utterance exception. We find that the paramedics prior questioning of Keisha tainted any exciting influence that might have stilled Keisha's reflective capacity and thus the admission of these statements was error. Under these facts, we conclude that in his appellate brief, Schutte failed to raise obvious errors of the trial court.

On March 26, 1992, the Ohio Court of Appeals denied Paris's appeal. Four months passed before Schutte informed Paris that his appeal was denied. Upon learning of the outcome of his appeal, Paris contacted the Ohio Public Defender for legal assistance. The Public Defender placed Paris on a waiting list for three years because of the large caseload and limited personnel of the Public Defender's office.

In August 1995, the Public Defender finally filed a motion in the Ohio Court of Appeals to reopen Paris's case.

The Ohio Court of Appeals denied the motion on October 23, 1995, based on Ohio App. R. 26(B), which provides:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment and conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the application shows good cause for filing at a later time.

The court held that Paris failed to show "good cause" for filing his motion three years after the Ohio Court of Appeals decision. The Court of Appeals' decision was affirmed by the Ohio Supreme Court. *State v. Paris*, 76 Ohio St.3d 270, 667 N.E.2d 390 (1996).

On October 21, 1996, Paris filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. Paris's petition was dismissed without reaching the merits because the district court found that Paris had procedurally defaulted by not abiding by the time limitations set forth in Ohio App. Rule 26(B) and was unable to show cause and prejudice for the default. Paris made a timely appeal to this court.

This court examines four factors when deciding whether a petitioner's state procedural default precludes consideration of the merits of a habeas corpus petition: (1) whether the state has a procedural rule that is applicable to the petitioner and with which the petitioner has failed to comply; (2) whether the state courts actually enforce the state procedural rule; (3) whether the state procedural rule is an adequate and independent state ground that forecloses review

of a federal constitutional claim; and (4) whether the petitioner can show cause for failing to follow the rule and that he was prejudiced as a result. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir.1986). In order for a state rule to serve as a procedural default, the court must answer the first three inquiries in the affirmative and the fourth in the negative.

Paris asserts that he can establish cause and prejudice for his failure to follow Ohio App. R. 26(B). He first points to his attorney's failure to inform him of the result of his appeal of right for four months. It is true that Paris's attorney so failed to inform him. This explains 120 days of the more than three year delay. Moreover, Paris's attorney also failed to communicate to his client how to proceed with further appeals. The United States Supreme Court has held that ineffective assistance of counsel constitutes cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). We have no difficulty in finding that Schutte provided ineffective assistance of appellate counsel as defined under *Strickland v. Washington*, 466 U.S. 668 (1984).

After learning of the outcome of this appeal, Paris contacted the Ohio Public Defender for legal assistance. Because of the large caseload of the Public Defender, Paris was placed on a three year waiting list. The District Court concluded that Paris's claim was barred because he failed to appeal the decision of the Ohio Court of Appeals for three years after his attorney informed him of the Court of Appeals decision. We cannot agree with the District Court. First, Paris's appellate attorney on his appeal of right gave him no guidance on how to further appeal and failed to develop the legal issues that would most likely allow Paris to succeed on appeal. Because of this, we do not think that it can fairly be said that Paris truly had his first appeal as of right. Second, it

would be unjust to blame a layman such as Paris for the backload at the Ohio Public Defender's Office. They did not inform him that he was in danger of procedural default and as a layman it would not be evident to him that his claim might procedurally expire while in the hands of the Public Defender. To hold otherwise would be to allow the incompetency of Paris's appellate counsel and the backlog at the Ohio Public Defender's office to eviscerate Paris's right to a meaningful first appeal. Hence, we find that the cause for Paris's delay is the incompetence of his appellate counsel and the backlog at the Ohio Public Defenders office.

Paris is likewise able to show prejudice. The Ohio trial court wrongly interpreted the law of hearsay in Ohio and violated the Confrontation Clause of the United States Constitution, thus admitting testimony in violation of Paris's rights under state and federal law.

Accordingly, the case is remanded to the District Court with instructions to issue the writ of habeas corpus, giving the state a reasonable time to retry the petitioner.

FARRIS, J., Circuit Judge, dissenting.

Paris has demonstrated neither cause for his procedural default nor prejudice therefrom. Thus, I dissent.

I. Cause

The majority holds that the incompetence of Paris's appellate counsel and the backlog at the Ohio Public Defender's office constitute cause for his delay. Both grounds are untenable.

The Supreme Court has held that ineffective assistance of counsel cannot constitute cause if it occurs at a stage where the petitioner is not constitutionally entitled to counsel. *See Coleman v. Thompson*, 501 U.S. 722, 751-53 (1991). After Paris's direct appeal was denied, he had no right to counsel. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Therefore, the fact that after this point (1) Paris's attorney failed to communicate with him, and (2) the Public Defender was too busy to press his post-conviction claim for more than three years, cannot satisfy the legal definition of cause. Under these circumstances, Paris cannot claim that a bad lawyer is worse than no lawyer at all.

The majority not only ignores the relevant Supreme Court case law, it sets a dangerous precedent. The vast majority of Paris's lengthy delay in filing his Rule 26(B) petition is attributable to the backlog at the Public Defender, not the deficiency of his counsel on direct appeal. If Paris had hired private counsel for the post-conviction proceedings, the majority surely would not accept "backlog" as an excuse for delay. Nor would it allow a pro se petitioner to sit on his claim for so long. The result should be no different where the Public Defender's office serves as counsel. *See State v. White*, 72 Ohio St.3d 91 (1995). These attorneys are no less capable of adhering to procedural rules than the rest of the bar.

Finally, a prior panel of this Court has refused to find cause in nearly identical circumstances. *See Riggins v. Turner*, 110 F .3d 64, 1997 WL 144214 at *2 (6th Cir.1997) (unpublished). In *Riggins*, the petitioner was convicted of rape, and his appeal was denied. Eight years later, he filed a Rule 26(B) petition, which was denied as untimely. On habeas review, he claimed that his counsel on direct appeal was ineffective for, among other things, failing to argue that his trial counsel was ineffective for not objecting to the admission of certain evidence. He argued that appellate counsel's ineffectiveness was cause for his failure to file a timely Rule 26(B) petition. Citing *Coleman, supra*, the panel rejected this argument. Although not binding, *see United States v. Skinner*, 25 F.3d 1314, 1318 (1994), this recent decision is strong persuasive authority.

II. Prejudice

Even more disturbing is the majority's conclusion that Paris was prejudiced by the Ohio courts' refusal to grant his Rule 26(B) petition. After a cursory analysis of Ohio hearsay law, the majority holds that Keisha Walker's statements do not fall under the excited utterance exception to the hearsay rule, and therefore they should have been excluded. A wealth of Ohio case law belies the majority's assertion.

First, the Supreme Court of Ohio has recognized that trial courts have "a wide discretion ... to determine whether in fact a declarant was at the time of an offered statement still under the influence of an exciting event." *State v. Duncan*, 53 Ohio St.2d 215, 219 (1978). If the trial court's resolution of this factual question is reasonable, an appellate court should not disturb it. *State v. Wallace*, 37 Ohio St.3d 87, 90 (1988).

Ohio courts have also recognized a "clear judicial trend to liberalize the requirements for an excited utterance when applied to young children victimized by sexual assaults." *State v. Wagner*, 30 Ohio App.3d 261, 263 (1986). This trend is based partly on the recognition that "children are likely to remain in a state of nervous excitement longer than would an adult." *State v. Taylor*, 66 Ohio St.3d 295, 304 (1993). It also arises from "the recognition of [a child's] limited reflective powers. Inability to fully reflect makes it likely that the statements are trustworthy." *Id.*

Although the statements of a child witness, not a victim, are at issue here, the rationale behind the trend still applies. Keisha Walker was undoubtedly traumatized by the sight of her stepfather savagely beating her younger brother. Paramedics testified that the boy ended up with bruises over 90% of his body, including his eyes, ears, and scrotum. The trial court could have reasonably concluded that Keisha remained in a "state of nervous excitement" thirteen hours after witnessing this terrible abuse. *See id.* It also could have reasonably concluded that the four-year-old Keisha had "limited reflective powers." *See id, see also State v. Wagner*, 30 Ohio App.3d 261, 264 (1986) ("As a three-year-old, truly in the age of innocence, [the victim] lacked the motive or reflective capacities to prevaricate the circumstances of the attack") Under these circumstances, Keisha's statements are inherently trustworthy.

The majority improperly relies on the thirteen hour gap between the beating and Keisha's initial statements. In the child abuse context, Ohio courts have applied the excited utterance exception to statements that were made long after the related incident. *See, e.g., Wallace*, 37 Ohio St.3d at 90 (statements admitted despite gap of fifteen hours); *Wagner*, 30 Ohio App.3d at 261-62 (initial statements admitted

despite gap of roughly twelve hours, second set of statements admitted despite gap of six days); *State v. Johnson*, 1992 WL 205119 at *6 (Ohio App. 8 Dist.) (unpublished) (statements admitted despite 24 hour gap).

Likewise, the fact that Keisha did not mention the abuse until questioned by the paramedics is not dispositive. Ohio courts have upheld the admission of elicited statements as excited utterances. *See, e.g., Wagner*, 30 Ohio App.3d at 263-64; *Wallace*, 37 Ohio App.3d at 91-92; *Johnson*, 1992 WL 205119 at * 7. Moreover, *Idaho v. Wright*, 497 U.S. 805, 813 (1990), relied upon by the majority, is inapplicable. The state need not show that hearsay statements "carry sufficient particularized guarantees of trustworthiness" if they "fall [ ] within a firmly rooted hearsay exception" *Id.* at 816. Excited utterances are just such an exception.

The majority incorrectly concludes that the paramedics' initial questioning of Keisha "tainted any exciting influence", and therefore her later statements to the hospital workers are inadmissible. Ohio courts have upheld the admission of subsequent statements as excited utterances. *See, e.g., Wagner*, 30 Ohio App.3d at 167 (upholding admission of statements made to police detective five days after initial statement to mother); *Johnson*, 1992 WL 205119 at *6 (upholding admission of statements made to detective one day after prior questioning by same detective).

In holding that Keisha's statements are inadmissible, the majority improperly substitutes its judgment for that of the trial court. It also ignores Ohio's clear trend toward admitting such statements. The trial court's resolution of this evidentiary issue was not unreasonable, and therefore it should be upheld on appeal. Even if it was unreasonable, however, the record contains other evidence of Paris's guilt.

As his lawyer acknowledged on direct appeal, Paris admitted at trial that he struck Darius Walker. This fact alone undermines Paris's claim of prejudice.

Finally, the majority overreaches in instructing the state to afford Paris a new trial. Both Paris's petition and the majority opinion are premised on the assertion that he was denied a meaningful first appeal. Given these circumstances, a more appropriate remedy would be to require the state to allow an out-of-time post-conviction appeal. [FN1] *See Byrd v. Smith*, 407 F.2d 363, 366 (5th Cir.1969). This approach would allow the Ohio courts to decide issues of Ohio evidentiary law. Moreover, it would provide Paris exactly what he sought in his Rule 26 petitions. The majority's usurpation of the available state processes ignores principles of federalism and comity.

FN1. If the state fails to provide this opportunity within a reasonable time, a new trial or unconditional release would be appropriate. *See id.*

I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 97-4129

DAVID PARIS,
Petitioner-Appellant,

v.

MELODY TURNER, Warden.
Respondent-Appellee.

Filed: August 19, 1999

Before: MERRITT, COLE, and FARRIS, [FN*] Circuit Judges.

FN* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Farris would grant rehearing for reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
LEONARD GREEN, CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOTICE: THIS IS AN UNPUBLISHED OPINION

No. 97-4129

DAVID PARIS,
Petitioner-Appellant,

v.

MELODY TURNER, Warden
Respondent-Appellee.

Argued: November 6, 1998
Decided and Filed: March 3, 1999
Vacated: May 26, 1999

Before: MERRITT, COLE, and FARRIS, [FN*] Circuit Judges.

FN* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

R. GUY COLE, JR., Circuit Judge. David Paris appeals the district court's dismissal of his habeas corpus petition filed pursuant to 28 U.S.C. 2254, in which he

challenges his 1991 conviction for felonious assault based on his contention that he received ineffective assistance of counsel on direct appeal. The district court dismissed the petition on the grounds of procedural default, finding that Paris failed to file his ineffective assistance claim within the ninety-day deadline set forth by Ohio App. R. 26(B). For the reasons that follow, we AFFIRM the judgment of the district court.

I.

On September 17, Darius Walker, a young boy, was found by paramedics at his babysitter's apartment with bruises over his body, having been struck with a belt, flashlight and fists. Walker was taken to the hospital and treated for his injuries. Law enforcement arrested David Paris, Walker's stepfather, and charged him with felonious assault in violation of O.R.C. 2903.11 and child endangerment in violation of O.R.C. 2919.22. Paris was convicted on June 21, 1991 of felonious assault and sentenced to prison for a term of eight to fifteen years.

Paris appealed his conviction to the Ohio Court of Appeals and, because he was indigent, received appointed counsel. However, Paris's appointed counsel, Stephen Schutte, filed a brief which contained a short five-paragraph argument[1] that failed to address what Paris contends were his

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[1] The entire substantive part of the brief states the following:

Assignment of Error

The Court erred in charging the jury with an instruction for felonious assault when the facts indicated an offense of simple assault.

meritorious grounds for appeal: the district court's admission of out-of-court statements of a four-year-old declarant without conducting a voir dire hearing to determine competence and other out-of-court statements that fell outside the hearsay exception. On March 26, 1992, the Ohio Court of Appeals denied Paris's appeal.

Schutte neglected to inform Paris of the outcome of his direct appeal until four months had passed. Upon finally learning of the outcome, Paris contacted the Ohio Public Defender for legal assistance. However, because of the Public Defender's large caseload and limited personnel, Paris was placed on a waiting list for three years. During this time, Paris did not appeal the Ohio Court of Appeal's decision to the Ohio Supreme Court, nor did he file an ineffective assistance of counsel claim.

Argument of Error

As noted in the Statement of Facts, the Court charged the jury with both felonious assault and the lesser included offense of assault. It is Appellant's contention that the charge should have been one for the lesser included offense of assault.

The distinction between R.C. 2903.11 and 2903.13 is crucial herein. R.C. 2903.11 states "(A) No person shall knowingly: (1) cause serious physical harm to another." R.C. 2903.13 states (sic) (A) No person shall knowingly cause . . . physical harm to another."

The writer can find no distinction in Ohio law that distinguishes between "physical harm" and "serious physical harm". (sic). The subject is treated at 87 ALR 2d 926.

In August 1995, the Public Defender finally filed a motion in the Ohio Court of Appeals to reopen Paris's case alleging ineffective assistance of counsel. The Ohio Court of Appeals denied the motion on October 23, 1995, based on Ohio App. R. 26(B), which provides:

> A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the application shows good cause for filing at a later time.

(emphasis added). The court held that Paris failed to show "good cause" for waiting to file his motion three years after the Ohio Court of Appeals decision. Paris appealed the Ohio Court of Appeals' decision to the Ohio Supreme Court, which affirmed the decision of the lower court. *See State v. Paris*, 76 Ohio St. 3d 270, 667 N.E.2d 390 (1996).

On October 21, 1996, Paris filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio.[2] The case was referred to a magistrate judge, who issued a report and recommendation stating that Paris's petition should be dismissed without reaching the merits because he had procedurally defaulted by not abiding by the time limitations set forth in Ohio App. Rule 26(B) and was unable to show cause and prejudice for

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[2] Because Paris filed his petition after April 24, 1996, his petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

the default. Paris objected, but the district court adopted the magistrate judge's initial and supplemental report and recommendation and dismissed the petition based on procedural default. Paris filed a timely notice of appeal.

II

Paris appeals the district court's dismissal of his habeas corpus petition on the basis of procedural default. When considering a district court's dismissal of a habeas petition, we review the district court's legal findings de novo, and its factual findings for clear error. *See Cardinal v. United States*, 954 F.2d 359, 362 (6th Cir.1992).

This court examines four factors when deciding whether a petitioner's state procedural default precludes consideration of the merits of a habeas corpus petition: first, whether the state has a procedural rule that is applicable to the petitioner and with which the petitioner has failed to comply; second, whether the state courts actually enforce the state procedural rule; third, whether the state procedural rule is an adequate and independent state ground that forecloses review of a federal constitutional claim; and fourth, whether the petitioner can show cause for failing to follow the rule and that he was prejudiced as a result. See *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). In order for a state rule to serve as a procedural default, the court must answer the first three inquiries in the affirmative, and the fourth in the negative.

Paris concedes the first two factors of the *Maupin* test,[3] but bases his argument on the third and fourth factors.

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[3] At oral argument, Paris argued for the first time that Rule 26(B) was not firmly established and regularly followed at the time of

He contends that courts have applied the "good cause" requirement of Rule 26(B) inconsistently and, therefore, it is not an adequate state procedural bar, citing to instances in which courts have allowed delays well after the ninety-day deadline. *See State v. Nitenson*, 1994 Ohio App. LEXIS 827, No. 91 CA 796, 1994 WL 69894 (Ohio App. 4 Dist., Feb 24, 1994) (one year delay); *State v. Wright*, 1994 Ohio App. LEXIS 3374, No. 93 CA 2110, 1994 WL 398805 (Ohio App. 4 Dist., July 29, 1994) (ten month delay). He also argues that Rule 26(B) does not provide any clear guidelines for determining when a petitioner can file his petition beyond the ninety-day filing period, citing for support *Morales v.*

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his June 21, 1991 conviction because it was not codified until July 1, 1993. If we were to consider this late argument, we would find that it has no merit. While Paris is correct that prior to July 1, 1993, Rule 26 did not contain a distinct provision for ineffective assistance of counsel claims, it did set forth a ten-day time limit for the "application for reconsideration of any cause or motion submitted on appeal." Following the Ohio Supreme Court's recommendation that the legislature adopt an amendment to better serve defendants who allege ineffective assistance of counsel, *see State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), Rule 26(B) was enacted to provide a ninety-day limit for ineffective assistance of counsel claims.

Regardless of the time limitations set forth in Rule 26, Paris waited three years after learning of his defeat on direct appeal before filing his ineffective assistance of counsel claim in the Ohio Court of Appeals. This delay cannot be attributed to Schutte, and Paris offers no other explanation. Moreover, the Ohio Courts have applied the ninety-day requirement of Rule 26(B) to convictions older than Paris's. *See State v. White*, 1991 Ohio App. LEXIS 357, 1991 WL 8581 (Ohio App. 8 Dist., Jan. 31, 1991), *aff'd*, 72 Ohio St. 3d 91, 647 N.E.2d 787 (1995); *State v. Klein* 1991 Ohio App. LEXIS 1346, 1991 WL 41746 (Ohio App. 8 Dist., Mar. 28, 1991), *aff'd*, 69 Ohio St. 3d 1481, 634 N.E.2d 1027 (1994).

Calderon, 85 F.3d 1387, 1393 (9th Cir.) (striking down a California statute for habeas corpus timeliness requirements in part for vagueness), cert. denied, 519 U.S. 1001, 117 S. Ct. 500, 136 L. Ed. 2d 391 (1996).

We are unpersuaded by this argument because it misrepresents the purpose and meaning of Rule 26(B)'s "good cause" provision. By virtue of including this provision, the state legislature intended that courts have the discretion to consider ineffective assistance of counsel claims after the ninety-day deadline, provided there is good cause. The fact that some courts have considered a claim after the ninety-day deadline is consistent with, not contradictory to, the rule. Although "good cause" is subject to interpretation by the courts, the language of Rule 26(B) is precise: a defendant must file his application within ninety days or show good cause for the delay. Unlike the California rule at issue in Morales, the Ohio rule sets forth a petitioner's obligation to file a claim within the ninety-day deadline and the burden he must satisfy if he fails to meet that deadline.

Paris also contends that even if Rule 26(B) is an adequate and independent state ground and thus constitutes a procedural bar, he can establish cause and prejudice, the fourth prong of the test. *See Maupin*, 785 F.2d at 138. Paris argues that Schutte's failure to communicate to Paris that he had lost on direct appeal had the effect of "significantly damaging his chances for an application for reopening from the outset." *See, e.g., Boyd v. Cowan*, 494 F.2d 338, 339 (6th Cir. 1974) (stating that the attorney's duty to communicate with his client fully and promptly is particularly compelling when the client is incarcerated). In essence, Paris argues that Schutte is responsible for the entire three-year delay that transpired between his defeat on direct appeal and his filing

of ineffective assistance of counsel pursuant to Rule 26(B), when he was represented by the Ohio Public Defender.

We reject this argument. Although Paris had a constitutional right to effective assistance of counsel on direct appeal, *see Evitts v. Lucey*, 469 U.S. 387, 397, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985), he had no such right to counsel on discretionary matters such as a civil post-conviction action, *see Pennsylvania v. Finley*, 481 U.S. 551, 555, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987), even if the action involves alleged mistakes made on direct appeal. Attorney error cannot constitute cause when the error resulted in a petitioner's default in a proceeding in which he was not constitutionally entitled to counsel. *See Coleman v. Thompson*, 501 U.S. 722, 751-53, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991); *see also Riggins v. Turner*, 110 F.3d 64, 1997 WL 144214, at *2 (6th Cir. 1997) (unpublished).

The district court acknowledged that Schutte was responsible for the four-month delay informing Paris of the verdict on direct appeal and that Paris would have satisfied the "good cause" requirement if that were the only delay. We agree with the district court. It is of no consequence in this case, however, as we also agree with the district court that Schutte is not responsible for the additional three-year delay. Because Paris had no right to counsel on discretionary appeal, he bore the burden of complying with the procedural requirements of Rule 26(B). Paris sought and awaited discretionary counsel at his own peril.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

No. C-3-96-409

DAVID PARIS,
Petitioner

v.

MELODY TURNER, WARDEN,
Respondent.

Filed: August 22, 1997

DECISION AND ENTRY ADOPTING INITIAL (DOC. #14) AND SUPPLEMENTAL (DOC. #18) REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE; PETITIONER'S OBJECTIONS TO SAID JUDICIAL FILING (DOC. #16 AND #19) OVERRULED; PETITION FOR WRIT OF HABEAS CORPUS DISMISSED AS PROCEDURALLY DEFAULTED; JUDGMENT TO ENTER IN FAVOR OF RESPONDENT AND AGAINST PETITIONER; CAPTIONED CAUSE RECOMMITTED TO UNITED STATES MAGISTRATE JUDGE FOR *IN FORMA PAUPERIS* AND CERTIFICATE OF APPEALABILITY ANALYSIS; TERMINATION ENTRY

Based upon the reasoning and citations of authority set forth by the United States Magistrate Judge in his initial (Doc. #14) and Supplemental (Doc. #18) Reports and Recommendations and the response by Respondent to Petitioner's Objections to the initial Report and Recommendations (Doc. #17), as well as upon a thorough *de novo* review of this Court's file and the applicable law, said Reports and Recommendations are adopted in their entirety. The Petitioner's Objections to said judicial filings (Doc. #16 and #19) are overruled.

In ruling as aforesaid, this Court makes the following, non-exclusive, observations:

1. Ohio R. App. P. 26(B)(1), requiring that a motion for reopening an appeal must be filed within 90 days of journalization of the judgment sought to be reopened, is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim, as that term is defined in *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). Indeed, the aforementioned rule of appellate procedure has been recognized as such by the Sixth Circuit Court of Appeals in an appeal of a case from this court. *Riggins v. Turner*, No. 95-4027 (6th Circuit Court of Appeals, March 27, 1997, unreported). The state's interest in finality of judgments warrants no other conclusion.

2. Of course, the 90 day procedural bar is applied in *seemingly* inconsistent fashion. Any procedural time limit, coupled with a good cause exception thereto, must, by definition, be dependent upon the unique set of facts and circumstances in that given case. It is, accordingly, hardly surprising that a delay of a given period of time (say, for example, 36 months) will prove to be, under one set of circumstances, cause to have delayed for that period of time,

while, under a different set of circumstances, will be found to bar the defendant's request to reopen his appeal.

3. In this case, cause has simply not been demonstrated by this Petitioner. It absolutely defies belief that the appellate court would have denied a Petitioner's motion to reopen his appeal, even though said motion were filed beyond the 90 day period of time, should Petitioner have made timely motion, as soon as he discovered that his initial appeal had been denied, and, moreover, was able to represent that he had not been alerted by his opposing counsel of said denial. If not being alerted by one's appellate counsel until more than 90 days after the appeal has been denied is not good cause for a Petitioner to fail to follow the procedural rule, then good cause can never been shown. The failure of Petitioner to show cause in this case was not the additional 30 day period between the expiration of the 90 days and his discovering that his appeal had been denied; rather, the failure to show cause is bottomed upon the almost three year delay *after* the Petitioner had acquired such knowledge. The Ohio Supreme Court, in *State of Ohio v. White*, 72 Ohio St. 3d 91, 647 N.E.2d 787 (1995), clearly set forth that a delay occasioned by the heavy workload of counsel does not constitute good cause for a delay in filing of a motion to reopen.

WHEREFORE, based upon the aforesaid, this Court, having adopted the initial (Doc. #14) and Supplemental (Doc. #18) Reports and Recommendations of the United States Magistrate Judge and having overruled the Petitioner's Objections thereto (Doc. #16 and #19), orders the Petition for Writ of Habeas Corpus dismissed as procedurally defaulted. Judgment will be entered in favor of the Respondent and against Petitioner herein.

The captioned cause is recommitted to the United States Magistrate Judge for a Report and Recommendations on whether the Petitioner should be allowed to appeal *in forma pauperis* and whether a Certificate of Appealability should be issued by this trial court.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

August 22, 1997

s/Walter Herbert Rice
WALTER HERBERT RICE,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

Copies to:

Angela Wilson Miller, Esq.
Lillian B. Earl, Esq.
Magistrate Judge Michael R. Merz

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-96-409

DAVID PARIS,
Petitioner

v.

MELODY TURNER, WARDEN,
Respondent.

Filed: April 17, 1997

REPORT AND RECOMMENDATIONS

This is a habeas corpus case pursuant to 28 U.S.C. § 2254. Petitioner David Paris is represented by Assistant State Public Defender Angela Miller and raises one ground for relief: denial of effective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution (petition, Doc. #1, at 5). Respondent has filed a Return of Writ (Doc. #8) and Petitioner has, with Court permission, filed a Traverse (Doc. #11).

STATE COURT PROCEEDINGS

Mr. Paris was indicted by the Clark County Grand Jury for one count of felonious assault (Return of Writ, Doc., #8, Ex. A). After trial and conviction by a jury, he was sentenced to 8 to 15 years imprisonment (Id., Ex. B). Represented on appeal by Springfield attorney Stephen Schutte, he filed one assignment of error: "The Court erred in charging the jury with an instruction for felonious assault when the facts indicated an offense of simple assault." (Id., Ex. C). The Court of Appeals found that the victim was a two-year old boy who had been beaten with a belt, a flashlight, and the Defendant's fists, evidence obviously sufficient to permit a conviction for felonious assault if the jury believed it (Id. at E).

The Court of Appeals affirmed the conviction March 26, 1992, but Mr. Parks [sic] did not learn that fact until July, 1992, when he wrote the State Public Defender for assistance. The sole method in Ohio for challenging ineffective assistance of appellate counsel is by motion to reopen the appeal under Ohio R. App. P. 26(B), and the State Public Defender filed such a motion on Mr. Paris's behalf in August, 1995 (Return of Writ, Doc. #8, Ex. F). The Court of Appeals denied the motion October 23, 1995 (Id., Ex. I). The Ohio Supreme Court "affirm[ed] the judgment of the court of appeals for the reasons stated in its decision. *See State v. White* (1995), 72 Ohio St. 3d 91, 647 N.E. 2d 787." *State v. Paris*, 76 Ohio St. 3d 270, 667 N.E. 2d 390 (1996). Mr. Paris's Petition to this Court followed in October, 1996.

ANALYSIS

While a federal habeas petitioner is required to exhaust available state court remedies before filing his petition, Respondent concedes Mr. Paris has exhausted those remedies. However, Respondent asserts that merit consideration of Petitioner's claim is barred by his procedural default in presenting it to the Ohio courts.

A petitioner may not raise on federal habeas a federal constitutional right he could not raise on appeal in state court because of procedural default. *Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Engle v. Isaac,* 456 U.S. 107 (1982). If, because of a procedural default, a habeas corpus petitioner can no longer present one or more of his claims to the state courts, he has waived those claims for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *Murray v. Carrier,* 477 U.s. 478, 485 (1986); *Engle v. Isaac,* 456 U.S. 107, 129 (1982); *Wainwright v. Sykes,* 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). *Wainwright* replaced the "deliberate bypass" standard of *Fay v. Noia,* 372 U.S. 391, 82 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

The Sixth Circuit Court of appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Maupin v. Smith,* 785 F. 2d 135, 138 (1986).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.

(***)

> Second, the court must decide whether the state courts actually enforced the state procedural sanction.
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.*

Ohio plainly has a procedural rule which applies to making ineffective assistance of appellate counsel claims: they must be filed within ninety days of judgment in the court of appeals unless good cause is shown for filing later. Ohio R. App. P. 26(B). The Ohio Supreme Court has held that an attorney's heavy workload which prevents the filing does not constitute good cause under Rule 26(B). *State v. White*, 72 Ohio St. 3d 91, 647 N.E. 2d 787 (1995).

The second prong of *Maupin* requires that the procedural rule actually have been enforced against the petitioner. In this case the Court of Appeals expressly found that the claimed cause for delay – petitioner's counsel's heavy work load – was not good cause, relying on *White*.

(Court of Appeals Opinion, attached as Ex. I to Return of Writ, Doc. #8). The Ohio Supreme Court affirmed, itself expressly citing *White*. *Paris*, 76 Ohio St. 3d at 270. Thus a state procedural default was plainly enforced in this case against Mr. Paris.

The Ohio timely filing rule is plainly independent of federal grounds and is the kind of state procedural rule regularly held to be adequate; the States have an important interest in timely adjudication of claims. *Daniels v. Allen*, 344 U.S. 443 73 S. Ct. 397, 97 L. Ed. 469 (1953).

The question then becomes whether Mr. Paris can show cause and prejudice which will excuse his procedural default.

At one level Mr. Paris seems to argue that his cause for not filing the motion to reopen on time is that his attorney, Mr. Schutte, never told him that his conviction had been affirmed. Since that was clearly part of Mr. Schutte's duty to Mr. Paris and the failure happened in a proceeding in which Mr. Paris was entitled to appointed counsel, it would constitute cause if it were the sole reason for delay. However, Mr. Paris's motion papers in both this Court and the Ohio Court of Appeals make it clear he learned his conviction had been affirmed about 120 days after it happened, or 30 days outside the 90-day safe harbor in Ohio App. R. 26(B). However, the delay from then (July, 1992) until he actually filed the Motion for Reopening (August, 1995) was entirely caused by the heavy work load of the State Public Defender. It is this three-year delay which both the Ohio Court of Appeals and the Ohio Supreme Court held against Mr. Paris, not the thirty days during which he had not learned of the affirmance.

Attorney error cannot constitute cause where the error caused a petitioner to default in a proceeding in which he was not constitutionally entitled to counsel, e.g., a discretionary appeal or state post-conviction proceeding. *Coleman v. Thompson,* 501 U.S. 722, 111 S. St. 2546, 115 L. Ed. 2d 640 (1991). Ineffective assistance of counsel on appeal cannot constitute cause for failure to file a timely application for reopening of the direct appeal under Ohio App. R. 26(B) since a person is not entitled to counsel for the reopening. *Riggins v. Turner*, Case No. 95-4027 (6th Cir. 1997).

In sum, Mr. Paris procedurally defaulted on his claims by delaying the filing of his Motion for Reopening more than three years. The Ohio courts enforced that default against him and he has been unable to demonstrate cause and prejudice. His Petition should be dismissed without reaching the merits.[1]

April 17, 1997

s/Michael R. Merz
Michael R. Merz,
UNITED STATES
MAGISTRATE JUDGE

[1] Were the Court to reach the merits, it would certainly find that Mr. Schutte's grossly deficient performance meets the first prong of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); I offer no opinion on whether Mr. Paris was prejudiced thereby.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

No. C-3-96-409

DAVID PARIS,
Petitioner,

v.

MELODY TURNER, WARDEN,
Respondent.

Filed: June 4, 1997

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This habeas corpus case is before the Court on Petitioner's Objections (Doc. #16) to my Report and Recommendations (Doc. #14) recommending the Petition be denied because of the sole claim – ineffective assistance of appellate counsel – had been procedurally defaulted in the state court system. By General Order, the District Judges at Dayton have permitted me to reconsider matters *sua sponte* when objections are filed.

Petitioner raises two objections, but the second argues the merits of the ineffective assistance of counsel claim and is not discussed here because I continue to conclude this Court is barred from reaching the merits.

Petitioner's first objection has two parts: (1) that I erred in finding that the state appellate court's reason for not reopening Mr. Paris's appeal was an adequate and independent state ground for that court's decision and (2) that I erred in analyzing Mr. Paris's cause and prejudice analysis.

ADEQUATE AND INDEPENDENT STATE GROUND

The relevant chronology, with which Petitioner does not quarrel, is set out in the original Report:

> The Court of Appeals affirmed the conviction March 26, 1992, but Mr. Paris did not learn that fact until July, 1992, when he wrote the State Public Defender for assistance. The sole method in Ohio for challenging ineffective assistance of appellate counsel is by motion to reopen the appeal under Ohio R. App. P. 26(B), and the State Public Defender filed such a motion on Mr. Paris's behalf in August, 1995 (Return of Writ, Doc. #8, Ex. F). The Court of Appeals denied the motion October 23, 1995 (Id., Ex. I). The Ohio Supreme Court "affirm[ed] the judgment of the court of appeals for the reasons stated in its decision. *See State v. White* (1995), 72 Ohio St. 3d 91, 647 N.E. 2d 787." *State v. Paris*, 76 Ohio St. 3d 270, 667 N.E. 2d 390 (1996). Mr. Paris's Petition to this Court followed in October, 1996.

(Report and Recommendations, Doc. #14, at 2.)

Having found these facts, the original Report then applied the four-part procedural default analysis of *Maupin v. Smith*, 785 F. 2d 135, 138 (6th Cir., 1986). Petitioner likewise does not quarrel with the first two steps in my analysis:

1) Ohio has a procedural rule, embodied in Ohio R. App. P. 26(B), that a claim of ineffective assistance of appellate counsel must be raised by a motion to reopen the appeal, filed not later than 90 days after judgment on appeal , unless good cause be shown.

2) Ohio enforced this rule against Mr. Paris, denying his motion to reopen because it had been filed about 3½ years after his conviction was final on appeal. His asserted good cause for delay – the very heavy workload and consequent backlog of the State Public Defender's Office – was found not to be good cause by the Second District Court of Appeals, which found itself bound by Ohio Supreme Court precedent directly in point, *State v. White*, 72 Ohio St. 3d 91 (1995).

The third stage of the *Maupin* analysis is to determine if the state procedural rule is adequate and independent: independence is a question of state law, but adequacy is a question of federal law. *Liegakos v. Cooke*, 106 F. ed. 1381, 1385 (7th Cir. 1997). Mr. Paris concedes the Ohio rule in question is independent, but denies its adequacy. In doing so he relies heavily on *Carpenter v. Mohr*, Case No. C-2-96-117 (S.D. Ohio 1997) (Kinneary, J.) (unpublished, copy attached to Doc. #16).

In *Carpenter*, Judge Kinneary found that the state rule limiting reopening to 90 days in the absence of good cause was not an adequate state ground because it was not "firmly established and regularly followed" by the state courts, citing *Ford v. Georgia*, 498 U.S. 411, 423 (1991), quoting *James v. Kentucky*, 466 U.S. 341 (1984).

As evidence that the rule in question is not firmly established and regularly followed, *Carpenter* cites three state appellate decisions: *State v. Owens*, 1996 WL 146097 (Ohio App. Dist. 7; March 29, 1996); *State v. Holland*, 1994 WL 142735 (Ohio App. Dist. 10; April 21, 1994): and *State v. Nitenson*, 1994 WL 69894 (Ohio App. Dist. 4; February 24, 1994).

Judge Kinneary cites *Owens* for the proposition that some Ohio appellate courts have a standard under which good cause will almost never be found. *Carpenter* at 11. However, the court in *Owens* actually said that the appellant had offered no reason at all for his eight-year delay in filing. Judge Kinneary cited *Holland* as an example of courts which avoid the good cause issue and proceed directly to the merits. *Carpenter* at 11. However in *Holland* the Court of Appeals for Franklin County actually decided that the motion to reopen was both untimely and without merit. Finally, Judge Kinneary cited *Nitenson* as demonstrating some courts will almost always find good cause. *Carpenter* at 11. The appellate court there found good cause based on the *pro se* status of the appellant.

With all due respect to Judge Kinneary, I believe *Carpenter* was decided incorrectly. The opinion focuses on three unreported appellate decisions which do not have

controlling precedental weight in Ohio case law.[1] In contrast, there are numerous published opinions of the Ohio Supreme Court upholding the 90-day limit with the good cause exception. The following cases had been decided as of the time of the Superseding Report and Recommendations in *Riggins v. Turner*, C-3-94-359:

> In *State v. Reddick*, 72 Ohio St. 3d 88, 647 N.E. 2d 784 (1995), the Supreme Court considered arguments similar to those made here by Mr. Riggins. Reddick's conviction was final May 7, 1987; his application to reopen was not filed until August 31, 1993. The court held that the new App. Rule 26 applied to him with its express requirement of a showing of good cause for late filing. But it also held that a good cause requirement had existed at least since *Murnahan* and arguably before.
>
> > We hold, therefore, that the good-cause requirement of App. R. 26(B) succeeds and incorporates the good-cause requirement of *Murnahan* and former App. R. 14(B). Accordingly, an applicant who seeks to reopen an appellate judgment journalized before July 1, 1993 may not simply rely on the fact that App. R. 26(B) did not exist within ninety days following journalization of the appellate judgment, but must show

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[1] See Rule 2(G)(1) and (2), Ohio Supreme Court Rules of the Reporting of Opinions.

> good cause why he or she did not attempt to invoke the procedures available under former App. R. 26 and 14(B). Neither *Murnahan* nor App. R. 26(B) was intended as an open invitation for persons sentenced to long periods of incarceration to concoct new theories of ineffective assistance of appellate counsel in order to have a new round of appeals. Rather, both were intended to allow the belated presentation of colorable claims that defendants/appellants were prevented from presenting timely by particular circumstances. Lack of effort or imagination, and ignorance of the law, are not such circumstances and do not automatically establish good cause for failure to seek timely relief.

647 N.E. 2d at 786.

The Ohio Supreme Court has consistently followed *Reddick* in the cases that followed.

- In *State v. Franklin,* 72 Ohio St. 3d 372 (1995), the defendant waited for five years from affirmance of his conviction to file an application for reopening on ineffective assistance grounds. The court of appeals (*sic*) found no good cause of the delay. The Ohio Supreme Court affirmed, expressly

holding that ignorance of the law was not a sufficient justification for untimely filing.

- In *State v. Tucker*, 73 Ohio St. 3d 152 (1995), defendant waited four years to apply for reopening, the court of appeals found no good cause, and the Supreme Court affirmed.
- In *State v. Peeples*, 73 Ohio St. 3d 152 (1995), the court found no good cause for seven years delay before moving to reopen and reiterated that applications under both App.R. 26A) and (B) require a showing of good cause for delay, citing *Reddick*.
- In *State v. Houston*, 73 Ohio St. 3d 346 (1995), the court found no good cause for delay of a year in filing to reopen.
- In *State v. Cooey*, 73 Ohio St. 3d 411 (1995), the court found no good cause for delay when the application to reopen was filed almost seven years after affirmance of the conviction and over one year after amended App.R. 26(B) became effective.
- In *State v. Winstead*, 74 Ohio St. 3d 277 (1995), the conviction was affirmed on September 28, 1994, and the application for reopening was filed one day late (i.e. on the 91st day) because the chosen courier service had failed to make timely delivery. The Hamilton County Court of Appeals held that did not constitute good cause and the Supreme Court affirmed *per curiam*.
- In *State v. Charlton*, 74 Ohio St. 3d 231 (1996), the conviction was affirmed in 1992 and the application to reopen was not filed

until 1994. Both appellate courts found no good cause.

- In *State v. Harris*, 74 Ohio St. 3d 233 (1996), the defendant waited eleven years and was found not to have shown good cause.
- In *State v. Oden*, 74 Ohio St. 3d 234 (1996), the wait was five years and the result was the same.
- In *State v. Way*, 74 Ohio St. 3d 236 (1996), defendant waited five years and received the same ruling.
- In *State v. Witlicki*, 74 Ohio St. 3d 237 (1996), the appellant waited twelve years and was found not to have shown good cause for the delay.
- In *State v. Wickline*, 74 Ohio St. 3d 369 (1996), the defendant waited almost six years and was found not have shown good cause.
- In *State v. Bell*, 73 Ohio St. 3d 32 (1995), appellant failed to show good cause for a delay of three and one-half years.
- In *State v. Otis*, 73 Ohio St. 3d 39 (1995), a delay of two years was found unexcused.

(Id., February 29, 1996).[2] The recommended holding in *Riggins* that Ohio App. R. 26(B) constituted an adequate and independent state ground was adopted by this Court and has now been affirmed by the Sixth Circuit on appeal

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[2] Numerous additional Supreme Court decisions to the same effect have been reported since then.

(Information copy attached [now available at 1997 WL 144214])[3]

Judge Kinneary indicates in *Carpenter* that he has not been able to find one Ohio Supreme Court finding good cause in the face of an appellate court decision finding no good cause. Again, with all due respect to a senior judicial officer, I believe this proves Rule 26 is "firmly established" and is being "regularly followed." He cites to *State v. White*, 72 Ohio St. 3d 91, 647 N.E. 2d 787 (1995), in which Justice Wright dissented from the holding of the court that a severe backlog in the State Public Defender's Office did not constitute good cause. Of course the Court of Appeals relied in *White* in Mr. Paris's case and the Ohio Supreme Court affirmed on the basis of the appellate opinion. The Ohio law is the majority decision in *White*, not Justice Wright's dissent. Apparently before his retirement from the court, Justice Wright was persuaded by his colleagues, because he did not dissent from the holding in *State v. Williams*, 74 Ohio St. 3d 454, 659 N.E. 2d 1253 (1996), that a backlog in the public defender's office was not good cause for delay.

The interests of comity and federalism which underlie the adequate and independent state ground rule strongly support upholding App. R. 26(B) here. Unquestionably, the States have an interest in finality of criminal convictions. They are under no constitutional obligation at all to provide for collateral attack on convictions. When they do so, as

---

[3] Carpenter has no stare decisis effect on our decision of this case because Riggins was decided before Carpenter. Indeed, Judge Kinneary, under state decisis theory, should have followed Riggins. The problem with unreported decisions is that Judge Kinneary had no more way of learning about Riggins than I did of learning about Carpenter when the initial Report was written.

Ohio has done with App. R. 26(B), they are free to set absolute bright-line limits on the process. See *Daniels v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953)(meritorious argument in a capital case rejected because filed one day late; bright-line rule upheld as adequate and independent). Here, Ohio has adopted a clear rule but allowed a good cause exception . The reason which might constitute good cause would understandably vary and get picked out, in the usual common law way, over a period of time. This is not unlike the process which the federal courts have used and are using to define, over a range of cases, "excusable neglect" as it occurs in Fed. R. Civ. P. 6 and other places. In other words, choosing a bright-line rule and allowing judges to consider exceptions was a perfectly reasonable way to structure state consideration of ineffective assistance of appellate counsel claims. To invalidate the rule as *Carpenter* does, is to require Ohio's Courts of Appeals to hear claims of ineffective assistance of counsel whenever they are made and regardless of the reasons for delay. I recommend this Court adhere to its decision in *Riggins* that App. R. 26(B) is an adequate and independent state procedural rule.

CAUSE AND PREJUDICE

In the second part of his first objection, Mr. Paris argues I misanalyzed his cause and prejudice claim (Objections, Doc. #16, at 6-8).

At the fourth stage of the *Maupin* analysis, habeas petitioner can excuse his state procedural default and prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87,

97 S. Ct. 2497, 53 L.Ed. 2d 594 (1977). In my initial Report, I analyzed this matter as follows:

> At one level Mr. Paris seems to argue that his cause for not filing the motion to reopen on time is that his attorney, Mr. Schutte, never told him that his conviction had been affirmed. Since that was clearly part of Mr. Schutte's duty to Mr. Paris and the failure happened in a proceeding in which Mr. Paris was entitled to appointed counsel, it would constitute cause if it were the sole reason for delay. However, Mr. Paris's motion papers in both this Court and the Ohio Court of Appeals make it clear he learned his conviction had been affirmed about 120 days after it happened, or 30 days outside the 90-day safe harbor in Ohio App. R. 26(B). However, the delay from then (July, 1992) until he actually filed the Motion for Reopening (August, 1995) was entirely caused by the heavy work load of the State Public Defender. It is this three-year delay which both the Ohio Court of Appeals and the Ohio Supreme Court held against Mr. Paris, not the thirty days during which he had not learned of the affirmance.
>
> Attorney error cannot constitute cause where the error caused a petitioner to default in a proceeding in which he was not constitutionally entitled to counsel, e.g., a discretionary appeal or state post-conviction proceeding. *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L.Ed. 2d 640

> (1991). Ineffective assistance of counsel on appeal cannot constitute cause for failure to file a timely application for reopening of the direct appeal under Ohio App. R. 26(B) since a person is not entitled to counsel for the reopening. *Riggins v. Turner*, Case No. 95-4027 (6th Cir. 1997).

(Report and Recommendations, Doc. #14 at 4-5). I do not believe any additional analysis is necessary.

CONCLUSION

For the foregoing reasons, I again recommend that the Petition be dismissed on the merits as procedurally defaulted.

June 3, 1997.

s/Michael R. Merz
Michael R. Merz
UNITED STATES
MAGISTRATE JUDGE

APPENDIX G

IN THE SUPREME COURT OF OHIO

No. 95-2425

THE STATE OF OHIO,
Appellee,

v.

DAVID PARIS,
Appellant.

Submitted: June 25, 1996
Decided: August 7, 1996

In June 1991, appellant, David Paris, was convicted of felonious assault and sentenced to prison. In March 1992, the court of appeals affirmed the conviction and sentence. *State v. Paris* (Mar. 26, 1992), Clark App. No. 2836, unreported, 1992 WL 63387.

It is undisputed that Paris filed an application in August 1995 with the court of appeals to reopen his appeal under App.R. 26(B), alleging ineffective assistance of appellate counsel. In October 1995, the court of appeals denied appellant's motion to reopen because Paris failed to file his application within ninety days of the journalization of the appellate judgment, as required by App.R. 26(B). Further, the court found that Paris "has failed to show good

cause for his delay in filing his application to reopen his appeal."

Appellant appeals the denial to this court.

APPEAL from the Court of Appeals for Clark County, No. 2836.

Stephen A. Schumaker, Clark County Prosecuting Attorney, and Douglas M. Rastatter, Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, Ohio Public Defender, David Klaus and Angela Wilson Miller, Assistant Public Defenders, for appellant.

PER CURIAM.

We affirm the judgment of the court of appeals for the reasons stated in its decision. See *State v. White* (1995), 72 Ohio St.3d 91, 647 N.E.2d 787.

Judgment affirmed.

MOYER, C.J., and DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER, COOK and STRATTON, JJ., concur.

APPENDIX H

IN THE COURT OF APPEALS FOR
CLARK COUNTY, OHIO

C.A. No.: 2836
T.C. No. 90-CR-303

STATE OF OHIO,
Plaintiff-Appellee,

v.

DAVID PARIS,
Defendant-Appellant.

Filed: October 23, 1995

DECISION AND ENTRY

PER CURIAM:

David Paris has moved to reopen his appeal pursuant to App.R. 26(B). Paris alleges that the attorney who represented him during his direct appeal rendered ineffective assistance by failing to challenge the trial court's admission of certain out of court statements by a child declarant under the "excited utterance" exception to the rule against hearsay evidence.

David Paris was convicted of Felonious Assault following a jury trial in June 1991. Paris was sentenced to a term of eight to fifteen years imprisonment.

David Paris timely appealed to this court, arguing error in the jury instruction given by the trial court. We found no merit in the claimed error and affirmed Paris' conviction and sentence. *State v. Paris* (March 26, 1992), Clark App.No. 2836, unreported.

On August 22, 1995, three years after Paris' conviction was affirmed by this court, David Paris filed this application seeking to reopen his appeal.

David Paris did not file this application to reopen his appeal within ninety days after the journalization of this court's judgment, as App.R. 26(B) requires. Accordingly, this application must be denied as untimely unless Paris demonstrates good cause for the late filing. *State v. Reddick* (1995), 72 Ohio St.3d 88. *State v. Dever* (1995), 73 Ohio St.3d 722.

Paris has submitted affidavits from both himself and the Assistant State Public Defender who represents him. They state that prior appellate counsel failed to inform Paris of this court's decision affirming his conviction, that Paris discovered our decision on his appeal when he contacted this court in July 1992, and that Paris subsequently requested assistance from the State Public Defender's Office in July 1992. The affidavits further state that, due to the caseloads in the office of the Ohio Public Defender, Paris was placed on a waiting list and that almost three years passed before an attorney from that office was assigned in March 1995 to review Paris' case, and that during this three year period Paris

contacted the State Public Defender's Office over fifty times requesting legal assistance with his case.

The reasons on which Paris relies have been rejected by the Ohio Supreme Court as a basis from which the good cause showing required by App.R. 26(B) may be found. *State v. White* (1995), 72 Ohio St.3d 91. This court is bound to follow that statement of policy by the Supreme Court.

David Paris has failed to show good cause for his delay in filing his application to reopen his appeal. The application to reopen his appeal is denied.

SO ORDERED.

s/James A. Brogan
JAMES A. BROGAN,
PRESIDING JUDGE

s/Mike Fain
MIKE FAIN, JUDGE

s/Thomas J. Grady
THOMAS J. GRADY, JUDGE

Supreme Court, U.S.
FILED
MAR 20 2000
CLERK

(3)

No. 99-1184

In The

Supreme Court of the United States

LAURENCE MACK, Warden,

Petitioner,

v.

DAVID L. PARIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF DELAWARE, ALABAMA, ARKANSAS, CALIFORNIA, ILLINOIS, INDIANA, MICHIGAN, MONTANA, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, AND UTAH AND THE COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

As allowed by Supreme Court Rule 37, the *amici curiae* States, through their respective Attorneys General, submit this brief in support of Question 1 presented by petitioner. The *amici* have in place procedures for post-conviction litigation of federal constitutional claims, and those procedures include the appointment of counsel to represent the prisoner. Derelictions and shortfalls on the part of post-conviction counsel do not establish cause in federal habeas proceedings to excuse a procedural default occurring in state court. *Coleman v. Thompson*, 501 U.S. 722 (1991). The courts of appeals have consistently refused to carve out exceptions to that rule.

The Sixth Circuit has now decided otherwise. In its view, the backlog of work in the State Public Defender's office, which led to the untimely filing of the prisoner's state post-conviction motion, constituted cause for the ensuing procedural default. That result is at odds with decisions of the Court and of other federal courts of appeals.

Moreover, the rule underlying the court's decision is unworkable. If a supposed backlog of work can be cause, three outcomes are possible: the States will be compelled to increase the funding for defender services; the state courts will be pushed to excuse defaults allegedly stemming from an attorney's workload; and federal courts will have to conduct evidentiary hearings for prisoners to establish the factual basis of the tendered excuse. The first result may be desirable as a matter of public policy, but more funding for criminal defense services at the post-conviction stage is not a constitutional mandate. The

second consequence infringes the States' interest in the finality of criminal convictions. The third possibility will ensnare the federal courts in a never-ending scrutiny of state defender services in an effort to determine an undefined, but "acceptable," level of backlog and delay in representing state post-conviction applicants. In the absence of a violation of the Constitution, there is no room for such far-reaching federal supervision.

STATEMENT

After trial in the Court of Common Pleas, respondent David Paris was convicted of felonious assault, in violation of Ohio Revised Code § 2903.11. He was sentenced to a term of eight to fifteen years imprisonment. The Ohio Court of Appeals affirmed the conviction. Pet. App. 27a.

1. In the state court of appeals, Stephen Schutte was appointed to represent Paris. The state court affirmed Paris' conviction on March 26, 1992. Schutte did not tell Paris of the outcome; Paris learned of the affirmance in July 1992. At that point, Paris contacted the State Public Defender and requested counsel. It was not until August 1995 that the assistant public defender assigned to Paris' case moved to reopen the decision of the court of appeals, invoking Ohio Appellate Rule 26(B), alleging that Schutte had provided ineffective assistance on appeal.[1] To justify the filing of the motion beyond the 90 day period allowed

[1] Under Ohio law, an allegation that counsel provided ineffective assistance on direct appeal can be raised only by a motion to reopen the judgment of the court of appeals. Ohio App. R. 26(B)(1). *See State v. Murnahan*, 63 Ohio St. 3d 60, 65-66, 584 N.E.2d 1204, 1208-09 (1992).

by the rule, the assistant public defender cited his large caseload and the need to complete work on other cases. The court of appeals denied the motion, holding that Paris had not shown "good cause" for the late filing. Pet. App. 47a-48a. On Paris' appeal, the Ohio Supreme Court affirmed. Pet. App. 44a-45a.

2. Paris applied for federal habeas corpus in October 1996, repeating his claim that Schutte had been constitutionally ineffective, having failed to advance on appeal a challenge to the admission of certain hearsay evidence. Pet. App. 26a-27a. The district court held that Paris' claim was procedurally barred in light of his failure to comply with the time requirements of Rule 26(B). Schutte's failure to tell Paris that his conviction had been affirmed was immaterial. The state courts, in holding the motion untimely, had instead pointed to the three year lapse of time after the Public Defender had accepted Paris' case. Relying on *Coleman v. Thompson*, 501 U.S. 722 (1991), the district court decided that whatever error was attributable to the assistant public defender did not establish cause to excuse the default in federal habeas. Pet. App. 24a, 30a-31a, 42a-43a.

3. The district court issued a certificate of appealability, and in the ensuing appeal, the court of appeals affirmed. Rule 26(B) was an independent and adequate state ground, and Paris' failure to meet the 90 day time limit was sufficient to bar his claim in federal habeas corpus. Pet. App. 19a-20a. Paris, moreover, could not establish cause for the default: the default was not related to Schutte's failure to tell Paris that his conviction had been affirmed. It was instead tied to the three years that had passed before the Public Defender filed the motion.

Under *Coleman*, the Public Defender's action (or inaction) did not constitute cause. Pet. App. 20a-21a.

On Paris' motion for rehearing, a divided panel reversed the decision of the district court. Schutte, in the majority's view, had rendered ineffective assistance because he had not told Paris of the result or "how to further appeal." Schutte's post-decision inaction thus constituted cause. Pet. App. 5a. The backlog at the Public Defender's office also amounted to cause, Paris not being told of the risk of delay. Pet. App. 6a. Because the majority had already decided that, on the merits, Paris was right in charging that Schutte had been ineffective on appeal, Paris was ordered retried or released. Pet. App. 2a-3a, 6a.

The dissenting judge argued that after his direct appeal had been decided, Paris had no right to counsel. Because Paris had no right to counsel, it followed that he had no right to effective counsel. Under *Coleman*, the ineffectiveness of counsel could not be cause if Paris had no right to counsel. Schutte's failure to communicate with Paris and the Public Defender's workload, occurring at a time when Paris had no right to counsel, were thus insufficient to establish cause. Pet. App. 7a. To decide that Paris had demonstrated actual prejudice, the majority had misread state evidentiary law and had overlooked Paris' own testimony that he had struck the victim. Pet. App. 9a-10a, 11a.

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals that Paris established cause for his procedural default rests on three points: the state Public Defender did not tell Paris that work on his case would be delayed; Schutte did not tell Paris that his conviction had been affirmed; and Schutte also did not tell Paris of potential post-conviction remedies (presumably including Rule 26(B)). From this, the court concluded that Schutte had been constitutionally ineffective and that it would be "unfair" to hold Paris responsible for the delay occasioned by the Public Defender. Those conclusions are in square conflict with decisions of this Court and of the other federal courts of appeals.

a. Without question, Paris had no right to counsel in the state post-conviction proceedings.[2] *Murray v. Giarratano*, 492 U.S. 1, 7-9 (1989) (plurality); *Pennsylvania v.*

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[2] The state Public Defender was not appointed in the state courts – and under state law, was not required – to represent Paris. *See Zuern v. Tate*, 938 F.Supp. 468, 471 (S.D. Ohio 1996) (reviewing Ohio post-conviction procedure in light of 28 U.S.C. § 2261); *State v. Crowder*, 60 Ohio St. 3d 151, 152-53, 573 N.E.2d 652, 654 (1991); *State ex rel. McMinn v. Office of the Public Defender*, 26 Ohio App. 3d 16, 17, 497 N.E.2d 1382, 1383 (1985); Ohio Rev. Code Ann. § 120.06(B).

The Sixth Circuit has recently decided that prisoners such as Paris have a right to counsel (and perforce, a right to the effective assistance of counsel) in proceedings under Rule 26(B). *White v. Schotten*, 201 F.3d 743, 751-52 (6th Cir. 2000). The court of appeals is presumably more familiar with Ohio law (*Selvage v. Collins*, 494 U.S. 108, 109-10 (1990)), but in this instance, the Sixth Circuit has misread state law. Rule 26(B) is a specific post-conviction remedy, intended to reach only claims of ineffective assistance on the part of appellate counsel. *State v. Robinson*, 74

Finley, 481 U.S. 551, 555-57 (1987). He could not, therefore, make out a claim of ineffective assistance of counsel in the post-conviction context. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982). In turn, Paris could not advance, as cause, the quality of his representation by the Public Defender.

If the Sixth Circuit is viewed to say that the heavy caseload of the Public Defender's office itself amounted to cause for the default, the Seventh Circuit has held directly otherwise. *Tredway v. Farley*, 35 F.3d 288, 295-96 (7th Cir. 1994), *cert. denied*, 513 U.S. 1129 (1995). *See Sceifers v. Trigg*, 46 F.3d 701, 704 (7th Cir.), *cert. denied*, 516 U.S. 853 (1995) (delay in state post-conviction action, caused by state public defender and appointed counsel, not attributable to state); *Lane v. Richards*, 957 F.2d 363, 365 (7th Cir.), *cert. denied*, 506 U.S. 842 (1992) (same). *Cf., e.g., Shipp v. General Motors Corp.*, 750 F.2d 418, 428 & n.12 (5th Cir. 1985) (workload of attorney does not constitute excusable neglect under Fed. R. App. Pro. 4(a)); *McLaughlin v. City of LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981), *cert. denied*, 456 U.S. 979 (1982) (same as to Fed. R. Civ. Pro. 6(b)). If the Public Defender's failure to tell Paris of the backlog of work was thought to defeat some expectation on Paris' part, thus excusing him from the

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Ohio St. 3d 1518, 660 N.E.2d 472 (1996); *Murnahan*, 63 Ohio St. 3d at 65-66, 584 N.E.2d at 1209. *See also State v. Herrera*, 183 Ariz. 642, 645-46, 905 P.2d 1377, 1380-81 (Ariz. Ct. App. 1995) (listing states with similar procedure). In any event, the Sixth Circuit in this case decided only that delay on the part of the Public Defender amounted to cause; the extension of the right to counsel to Rule 26(B) proceedings was not presented to (or decided by) the court of appeals.

resulting default, that notion finds no support in the decisions of this Court. The prisoners in *Coleman* and *Torna* also had reasonable expectations that their respective attorneys would file the particular papers in a timely manner. In both cases, the Court decided that the prisoner shouldered the risk that counsel would miss the deadline. *Coleman*, 501 U.S. at 753-54; *Torna*, 455 U.S. at 588 n.4. The courts of appeals have shown no inclination to excuse procedural defaults occasioned by the failure of post-conviction counsel to meet a deadline: efforts to distinguish *Coleman* because counsel was court-appointed, the prisoner did not know of the deadline, the prisoner relied on his attorney, or counsel disregarded his client's instructions have all been rebuffed.[3]

b. Schutte certainly had a responsibility to advise Paris of the outcome of the appeal; the professional conduct rules require as much.[4] What Schutte did or did not do, though, is immaterial. In the state courts, Paris advanced only the delay engendered by the Public Defender as the explanation for his untimely filing; that is

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[3] *Fairman v. Anderson*, 188 F.3d 635, 642-43 (5th Cir. 1999); *Lamp v. State of Iowa*, 122 F.3d 1100, 1105 n.5 (8th Cir. 1997); *Miller v. Lock*, 108 F.3d 868, 871 (8th Cir. 1997); *Cawley v. DeTella*, 71 F.3d 691, 695 (7th Cir. 1995); *Shigemura v. Groose*, 45 F.3d 250, 252-53 (8th Cir.), *cert. denied*, 516 U.S. 855 (1995). *Cf. Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999) (attorney's error in calculating limitations period under 28 U.S.C. § 2244(d) not excusable under equitable tolling).

[4] *See Cleveland Bar Ass'n v. Tolliver*, 75 Ohio St. 3d 178, 661 N.E.2d 1055 (1996); *Office of Disciplinary Counsel v. Cox*, 58 Ohio St. 3d 124, 568 N.E.2d 1219 (1991); Model Rules of Professional Conduct, Rule 1.4(a).

the only explanation that could be considered by a federal court. *Crank v. Duckworth*, 969 F.2d 363, 366 (7th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993). The federal courts are to defer to the enforcement of state procedural rules by the state courts, that deference being necessary to foster the principles of comity and finality. That deference also minimizes the institutional and fiscal costs associated with federal habeas litigation. *E.g., Teague v. Lane*, 489 U.S. 288, 308-10 (1989); *Engle v. Isaac*, 456 U.S. 107, 127-29 (1982). A federal court does not further those aims when it excuses a procedural default on the basis of an explanation not given to the state courts. *Cf. Murray v. Carrier*, 477 U.S. 478, 489 (1986) (exhaustion doctrine requires presentation of claim of ineffective assistance being asserted as cause for procedural default).

This case, in fact, illustrates the danger of federal courts intruding into questions of state procedure. Ohio was not required to provide Paris with a lawyer to pursue his post-appeal remedy. The State instead chose to make a lawyer available, believing that the post-conviction process would lead to more reliable results.[5] The Sixth Circuit uses the "ineffective assistance" of that lawyer to excuse a procedural default under state law. The court can then overturn a conviction on the grounds that Paris' trial counsel (and the state trial judge) made an error of state evidentiary law, a question of state law that the federal court could not have reached directly. *See Estelle v.*

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[5] *See McFarland v. Scott*, 512 U.S. 849, 855-56 (1994); *Giarratano*, 492 U.S. at 12 n.7 (plurality); *Boyd v. Dutton*, 405 U.S. 1, 7 n.2 (1972) (Powell, J., dissenting).

McGuire, 502 U.S. 62 (1991). The procedural default doctrine works to keep such federal intervention to a minimum, forcing state prisoners to comply with state procedure to ensure that the state courts have the first chance to correct errors of both state and federal law. *E.g.*, *O'Sullivan v. Boerckel*, 119 S.Ct. 1728, 1734 (1999). If the state courts decide that the prisoner has run afoul of state procedure, federal habeas review is generally foreclosed. The usual exception, of course, occurs if, *inter alia*, the prisoner can show cause for the default. The Court in *Carrier* was careful not to articulate "an exhaustive catalog" of what might constitute cause. 477 U.S. at 488. Cause, however, is simply shorthand for saying that an independent violation of federal rights (or at the least, conduct imputed to the State) led to the default;[6] in that situation, the federal interest in unimpeded access to the federal courts outweighs any state interest in procedural regularity and finality. This is the import of *Coleman* and, in the context of abusive habeas petitions, *McCleskey v. Zant*, 499 U.S. 467 (1991);[7] this definition of cause also explains the refusal of the federal courts to find cause when the performance of post-conviction counsel fell below a standard set, not by the federal Constitution, but

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[6] *See Strickler v. Greene*, 119 S.Ct. 1936, 1949 (1999); *McCleskey v. Zant*, 499 U.S. 467, 501-02 (1991) (noting information at issue not concealed by prosecution); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). A prisoner might establish cause if the legal basis for his claim "was not reasonably available to counsel," *Carrier*, 477 U.S. at 488, but in light of the retroactivity doctrine announced in *Teague*, the prisoner's claim will nonetheless fail. *See Gacy v. Welborn*, 994 F.2d 305, 310-11 (7th Cir.), *cert. denied*, 510 U.S. 899 (1993).

[7] *See also Antone v. Dugger*, 465 U.S. 200, 205 n.3 (1984).

by state law or by federal statute.[8] Attorney error, to amount to cause, thus must constitute ineffective assistance under the Sixth Amendment.

The result reached by the Sixth Circuit is at odds with the interests furthered by the procedural default doctrine. Most states establish deadlines for the filing of post-conviction actions, and a failure to meet the deadline can be excused for various reasons.[9] The parameters of what will excuse non-compliance should be developed, in the first instance, by the state courts, not a federal court when there is no federal constitutional violation related to the default itself. The federal court is in no better position than is the state court to make that decision; unless the default on its own implicates a federal right, there is no superior federal interest to be vindicated. Without the default stemming from the infringement of a federal right, the Sixth Circuit has done no more than impose its views about what constitutes, under Ohio law, a permissible reason for not meeting the 90 day deadline of Rule 26(B). If the States "wish to detain those whom

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[8] *Weeks v. Angelone*, 176 F.3d 249, 273-74 (4th Cir. 1999), *aff'd on other grounds*,120 S.Ct. 727 (2000); *Callins v. Johnson*, 89 F.3d 210, 212-13 (5th Cir.), *cert. denied*, 519 U.S. 1017 (1996) (federal habeas counsel appointed under 21 U.S.C. § 848(q)); *Bonin v. Calderon*, 999 F.2d 425, 430-31 (9th Cir. 1993).

[9] *E.g.*, Del. Super. Ct. Crim. R. 61(i)(1), (5); 725 Ill. Stat. Comp. Ann. § 5/122-1(c); Md. Code Ann. art. 27, § 645A(a)(2)(ii); Or. Rev. Stat. § 138.510(2); S.C. Code Ann. § 17-27-45; Tenn. Code Ann. § 40-30-202; Utah Code Ann. § 78-35a-107(3).

they convict,"[10] they should not be expected to relax their procedural rules because a federal court has found a non-constitutional reason that excuses the default.

c. As irresponsible as Schutte may have been, his deficiency did not violate the Constitution. The Sixth Amendment imposes no duty on counsel to tell his client that he can challenge the adequacy of representation, but must do so within a fixed time. That principle parallels the rule that counsel has no constitutional duty to tell a defendant of his appeal rights following a guilty plea unless counsel has some reason to believe his client is interested in an appeal.[11] Requiring counsel to tell his client of the post-conviction process would often be confusing, create false hopes, and encourage frivolous post-conviction actions. *See Austin v. United States*, 513 U.S. 5, 8 (1994). Paris lost no more than an opportunity to move to reopen his appeal within the 90 days set out in the rule, an opportunity little different than the opportunity to file a petition for a writ of certiorari in this Court. The loss of that chance, whether caused by bad advice from counsel, no advice, or sheer neglect, does not run afoul of any constitutional provision. *Torna*, 455 U.S. at 587-88 & n.4. *See Ross v. Moffitt*, 417 U.S. 600, 617-18 (1974); *Miller*, 108 F.3d at 871; *Miller v. Keeney*, 882 F.2d 1428, 1431-33 (9th Cir. 1989); *United States v. Eisenhardt*, 10 F.Supp.2d 521, 522 (D. Md. 1998); *United States v. Ferrell*, 730 F.Supp. 1338, 1340 (E.D. Pa. 1989).

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[10] *Fay v. Noia*, 372 U.S. 391, 470 (1963) (Harlan, J., dissenting).

[11] *See Roe v. Ortega*, 120 S.Ct. 1029 (2000).

2. The States bear the costs of federal habeas corpus;[12] the rule underlying the decision of the Sixth Circuit will impose additional institutional and fiscal costs. The States have considerable latitude in crafting post-conviction procedures, including whether to provide counsel. *Giarratano*, 492 U.S. at 11 (plurality); *Finley*, 481 U.S. at 559. As a matter of public policy, the States have generally decided to do so. *E.g.*, 725 Ill. Comp. Stat. Ann. § 5/122-2.1(a)(1); Ind. Code Ann. § 33-1-7-2(a); Ky. Rev. Stat. Ann. § 31.110(2)(c); La. Code Crim. Proc. Ann. art. 930.7; Mont. Code Ann. § 46-21-201; N.C. Gen. Stat. § 7A-451(a)(3); S.C. Code Ann. § 17-27-60; Wash. Rev. Code Ann. § 10.73.150.

Complaints that public defender services are underfunded or overwhelmed by the volume of cases are not unknown or infrequent.[13] If, as the Sixth Circuit has decided, an attorney's excessive caseload amounts to

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[12] *Coleman*, 501 U.S. at 738-39; *Teague*, 489 U.S. at 309-10; *Engle*, 456 U.S. at 127-28.

[13] *In re Certification of Conflict*, 709 So.2d 101 (Fla. 1998); *Skitka v. State*, 579 So.2d 102 (Fla. 1991); *Platt v. State*, 664 N.E.2d 357 (Ind. App. 1996), *cert. denied*, 520 U.S. 1187 (1997); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996); *State v. Bianco*, 103 N.J. 383, 388, 511 A.2d 600, 603 (1986); *Castro v. State*, 880 P.2d 387, 391 (Okla. Crim. App. 1994), *cert. denied*, 514 U.S. 1024 (1995); J. Arango, *Defense Services for the Poor*, 12 Crim. Just. 49 (Spring 1997); D. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329 (1995); *Low-Bid Criminal Defense Contracting: Justice in Retreat*, 21 Champion 22 (Nov. 1997); R. Scheider, Jr., Comment, *A Measure of Our Justice System: A Look at Maine's Indigent Criminal Defense Delivery System*, 48 Me. L. Rev. 335, 375-78, 393-94 (1996); D. Wilson, Casenote, 22 Wm. Mitchell L. Rev. 1117, 1132-41 (1996).

cause, that rule will apply to a significant number of prisoners. Faced with a prisoner who seeks to excuse his procedural default because of his attorney's workload, a state court has three possible responses. The simplest is to refuse to excuse the default; the state court may conclude that the chance the prisoner will seek federal habeas relief is too small to warrant any revamping of state procedure, including providing more resources for defender services. D. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1153 (1986). *Cf. Coleman*, 501 U.S. at 738 (noting state courts have interest in ensuring decisions are respected by federal courts, but institutional and fiscal costs mostly borne by State). The second response is for the state court to excuse the default, believing it to be expedient to reach the merits of a claim that could be reached in federal habeas proceedings. Meltzer, 99 Harv. L. Rev. at 1156-57, 1193. That outcome, perhaps less intrusive now in light of the provisions of 28 U.S.C. § 2254(d)(1), is certainly perverse in light of the oft-stated purposes of the procedural default doctrine – reducing the burden of relitigation, ensuring compliance with state procedure, and enhancing the finality of criminal convictions. The third response is for the state court to declare the existing funding level inadequate. Wilson, 22 Wm. Mitchell L. Rev. at 1160. Additional resources for public defenders might be desirable as a matter of public policy, but the sums involved would not be negligible.[14] This result is also at odds with the

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[14] The public defender in Minneapolis sought an additional $5 million in 1992; the Oklahoma legislature in 1997 had to fund a shortfall of more than $2 million. *See Kennedy*, 544 N.W.2d at 4-5; Arango, 12 Crim. Just. at 49. *See also* Vick, 43 Buff. L. Rev. at

concept of federalism that has guided the Court's habeas jurisprudence for the last 20 years: under the guise of excusing a procedural default, a federal court can impel the State to allocate resources in a manner that court deemed proper. That result finds no support in *Finley* and *Giarratano* and would represent an amazing expansion of federal habeas jurisdiction. *Cf. Lewis v. Casey*, 518 U.S. 343, 381-82, 385-88 (1996) (Thomas, J., concurring).

3. The Court has noted the need for certainty and consistency in federal habeas litigation. *See Lonchar v. Thomas*, 517 U.S. 314, 322-23, 323-24 (1996); *O'Neal v. McAninch*, 513 U.S. 432, 443 (1995); *McCleskey*, 499 U.S. at 496. In light of the number of federal habeas actions filed by state prisoners, the Court has also been sensitive to the demands such litigation places upon the States and the federal judiciary. *O'Neal*, 513 U.S. at 443; *Carrier*, 477 U.S. at 487-88; *Rose v. Mitchell*, 443 U.S. 545, 584 (1979) (Powell, J., concurring in judgment). *See Custis v. United States*, 511 U.S. 485, 496 (1994); *McCleskey*, 499 U.S. at 491. The practical effect of the decision by the Sixth Circuit will undercut both of these interests.

a. Under *Carrier* and *Coleman*, questions of cause, based on counsel's conduct, are easily resolved: the derelictions of post-conviction counsel do not amount to cause (*Coleman*), and unless counsel's performance is constitutionally inadequate, his ignorance or inadvertence does not constitute cause (*Carrier*). Those bright-line rules aid in reducing the seeming complexity of federal habeas

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433-38 (arguing that compensation limits in place in South Carolina and Oklahoma for capital cases are "far below what is necessary" for "meaningful defense").

actions. In turn, a case that, by virtue of the application of a clear legal rule, has become streamlined can be decided more quickly than a complex case.

The Sixth Circuit, however, adds unwarranted complexity to federal habeas litigation. It would be the rare case in which the defendant's lawyer could not ascribe his error to a heavy workload. *See United States v. Perez*, 116 F.3d 840, 851 (9th Cir. 1997) (Kleinfeld, J., concurring in judgment) ("Preparation for trial is potentially infinite, but time is most assuredly finite."). In order to determine whether there was cause for the default, supposedly based on counsel's workload, the federal courts "would routinely be required to hold evidentiary hearings." *Carrier*, 477 U.S. at 487. If analogous cases – such as a State's satisfaction of the criteria set out in 28 U.S.C. § 2261 – are any indication, those hearings will not be perfunctory exercises. *See Hill v. Butterworth*, 941 F.Supp. 1129, 1144-47 (N.D. Fla. 1996), *rev'd*, 147 F.3d 1333 (11th Cir. 1998); *Booth v. Maryland*, 940 F.Supp. 849, 854 (D. Md. 1996), *vacated*, 112 F.3d 139 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 2063 (1998). *Cf. Harris v. Champion*, 15 F.3d 1538, 1548-53 (10th Cir. 1994) (describing proceedings in challenge to state direct appeal process). Though district judges might be able "to minimize the burdens to all concerned," the Court should not assume that there would be a negligible effect upon the States or the federal courts. *Carrier*, 477 U.S. at 487. *See McCleskey*, 499 U.S. at 491; *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring); *In re Certification of Conflict*, 636 So.2d 18, 22 (Fla. 1994) (noting need for hearing in light of number of cases and substantial financial impact). Instead, "an infinite continuum of litigation," focused only on the workload of

counsel who represented the prisoner at a particular time, will result. *Bonin*, 999 F.2d at 429. The inquiry itself will infringe on the actions of defense counsel, prosecutors asking to oversee counsel's work to ensure against subsequent intervention by a federal court and judges asking if counsel were truly overworked or simply dilatory. *See Perez*, 116 F.3d at 852-53 (Kleinfeld, J., concurring in judgment); *In re Certification of Conflict*, 636 So.2d at 23 (Harding, J., concurring) ("The issue here is who should exercise authority and make decisions about whether the public defender has the resources to perform all the responsibilities required by law. Except in the most unusual circumstances, I would leave that decision with the public defender and as a court would not second-guess it."). At the end of the inquiry, the ultimate question raised by the prisoner – the reliability of his conviction – will still be unanswered. *Cf. Withrow v. Williams*, 507 U.S. 680, 701 (1993) (O'Connor, J., concurring in part, dissenting in part) ("the judiciary suffers because its processes are diverted from the central mission of ascertaining the truth"); *Boyd*, 405 U.S. at 7-8 (Powell, J., dissenting) ("little likelihood" that new evidentiary hearing, eight years after guilty plea, "will be conducive to dependable factfinding"). Without furthering the goals of the federal courts' habeas jurisdiction, the repeated litigation engendered by the decision of the Sixth Circuit nonetheless impairs the States' interest in finality and will stretch already scarce federal judicial resources. *See McCleskey*, 499 U.S. at 491-92. Because the rule underlying the decision of the court of appeals carries significant costs without providing substantial benefits, it has no

place in federal habeas jurisprudence. *See Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993).

b. The rule, moreover, is standardless, making it difficult, if not impossible, for federal judges to apply and for the States to understand. If cause is to be based on workload, there is, as the Florida courts have discovered, no "accepted methodology to determine the maximum annual caseload for capital lawyers." *Hill*, 941 F.Supp. at 1156. In the context of non-capital litigation, caseload standards vary among the States. *In re Certification of Conflict*, 636 So.2d at 26-27. *See Rodriquez v. State*, 700 So.2d 79, 84 (Fla. App. 1997) (appellate public defender should average four to six briefs each month). Workload and any attendant delay might often stem from underfunding, but inefficient management is just as likely to be the cause. *Hill*, 941 F.Supp. at 1147 n.36; *Rodriquez*, 700 So.2d at 82-83; *Castro*, 880 P.2d at 391 ("this Court is not a forum to resolve inter-office shortcomings"). To the prisoner, delay is delay, but the management skills of a public defender can hardly be " 'imputed to the State.' " *Coleman*, 501 U.S. at 754. If, instead, cause is based on the extent of any delay, there is no obvious standard by which to judge what lapse of time is permissible. Three years, the amount of time that passed in this case, is presumably too long, but the Sixth Circuit does not imply what amount of time would be permissible. The absence of any clear standards demonstrates that the rule announced in this case is not "a sound and workable means of channeling the discretion of federal habeas courts." *Carrier*, 477 U.S. at 497.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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EDITOR'S NOTE

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No. 99-1184

In the Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, David L. Paris, through undersigned counsel, respectfully requests leave to file his Brief in Opposition without prepayment of costs or fees and to proceed *in forma pauperis* pursuant to Rule 39.

Respondent Paris was represented by appointed counsel at trial and on direct appeal in the state courts. Respondent's appeal to the Supreme Court of Ohio and subsequent Federal Habeas Corpus proceedings all proceeded *in forma pauperis*.

Respondent's affidavit in support of this motion is attached hereto.

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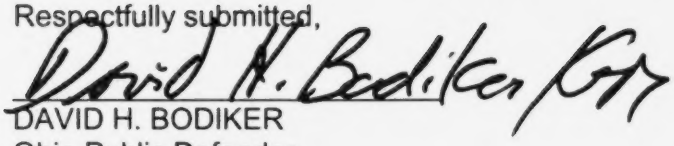
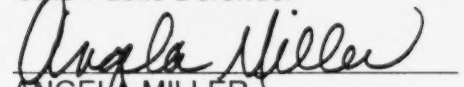
Respectfully submitted,



DAVID H. BODIKER
Ohio Public Defender



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No. 99-1184

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ON PETITION FOR WRIT OF CERTIORARI
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AFFIDAVIT OF INDIGENCY

I, **David L. Paris**, being first duly sworn, depose and say that in support of my Brief in Opposition without being required to pay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefore and that I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs associated with filing a Brief in Opposition are true.

1. Are you presently employed? YES

A. If the answer is yes, state the amount of your salary or wages per month and give the name of your address of your employer. $1280 Truckline Tool & Machine Inc, 200 Eagle City Road

B. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. _____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? no

A. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? yes

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property excluding ordinary household furniture and clothing? no

A. If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. Amber Paris & Preston Paris Daughter & son

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

David L. Paris

DAVID L. PARIS

Duly witnessed and sworn before me, a Notary Public, on this 31 day of March, 2000.

NOTARY PUBLIC

My Commission expires
September 16, 2001

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-vs-

DAVID L. PARIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT PARIS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1] Whether this Court should revisit the issue that an attorney appointed to represent an incarcerated client on direct appeal has a duty to: 1] raise obvious and reversible errors on appeal and; 2] communicate and consult with that client so that he knows how to proceed and that the complete failure to do so rises to the level of a Sixth Amendment violation that may serve as cause for excusing a procedural default. *Strickland v. Washington*, 466 U.S. 668 (1984); *Evitts. v. Lucey*, 469 U.S. 387 (1985); *Murray v. Carrier*, 477 U.S. 478 (1986).

2] Whether this Court should review the form of relief that was awarded to Respondent Paris – a matter that is purely discretionary – especially when the constitutionality of vesting this power with the federal courts is entirely settled. *Hilton v. Braunskill*, 481 U.S. 770 (1987); *Evitts v. Lucey*, 469 U.S. 387, 391, 405 (1985).

THIS COURT DOES NOT HAVE JURISDICTION TO ADDRESS THE WARDEN'S PETITION FOR WRIT OF CERTIORARI

The Warden fails to inform this Court that the mandate issued by the Sixth Circuit in Respondent Paris' case was never stayed, the conditional writ of habeas corpus issued, and that the State of Ohio has never taken any action to retry him. The finite time period specified by the district court to try Respondent Paris has expired. Thus, this case is moot. A more extended discussion of why this Court lacks jurisdiction is contained within the Argument section of this brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

3. Ohio R. App. P. 26(B) (Rule 26(B)) is reproduced in the appendix to this brief in opposition.

4. Current and Former S.Ct. Prac. R. II(2)(D)(1) are reproduced in the appendix to this brief in opposition.

5. Ohio Revised Code Section 2945.71 is reproduced in the appendix to this brief in opposition.

6. 28 U.S.C. §2243 (1984) is reproduced in the appendix to this brief in opposition.

STATEMENT OF THE CASE

On September 24, 1990, a Clark County, Ohio Grand Jury returned an indictment charging David Paris with one count of Felonious Assault, in violation of Ohio Revised Code Section 2903.11. Mr. Paris pleaded not guilty and vigorously protested his innocence at trial. However, on June 21, 1991, the jury found Mr. Paris guilty. Due to Mr. Paris' indigency, the trial court appointed counsel to assist him on direct appeal.

The trial court appointed Stephen Schutte for Mr. Paris' direct appeal. He filed a five-paragraph "brief" on Mr. Paris' behalf. The "brief" admitted the client's guilt despite the fact that he protested his innocence at trial, raised a single nonsensical error, misstated Ohio law, and did not raise obvious, meritorious issues.

On March 26, 1992, the state court of appeals affirmed Mr. Paris' conviction but appellate counsel never informed his client that his conviction was affirmed. Indeed, Mr. Paris did not find out that he had lost until several months after the judgment was entered. Mr. Paris wrote to the appellate court for a copy of his trial transcript because Schuttee refused his incarcerated client's collect phone calls and refused to answer his

letters. In an entry denying Mr. Paris a copy of his trial transcript, the appellate court informed him that his conviction was affirmed over four months earlier.

With the help of a jailhouse lawyer, Mr. Paris contacted the Office of the Ohio Public Defender for assistance in obtaining his trial transcript. On August 10, 1995, the Office of the Ohio Public Defender filed an Application to Reopen pursuant to Ohio App. R. P. 26(B) asserting that Schuttee was ineffective for failing to raise several meritorious issues.

On October 23, 1995, the state court of appeals rejected Mr. Paris' Application to Reopen because he did not file his application within the 90-day time period of the rule. Mr. Paris then timely appealed to the Supreme Court of Ohio. On October 7, 1996, the court affirmed the judgment of the court of appeals.

On October 21, 1996, Mr. Paris filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Ohio, Western Division. In his petition, Mr. Paris argued that he received ineffective representation on direct appeal and that this deficient representation violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

On August 22, 1997, the district court accepted the recommendation of the magistrate and denied relief. The court determined that Mr. Paris was procedurally barred and refused to address the issue of cause and prejudice. Mr. Paris promptly appealed his case to the United States Court of Appeals for the Sixth Circuit.

On March 3, 1999, the court of appeals initially affirmed the judgment of the district court because Mr. Paris had failed to comply with Ohio's 90-day time limit for raising ineffective assistance of appellate counsel claims. Mr. Paris filed a petition for

rehearing in the court of appeals based upon the fact that the ineffective assistance of appellate counsel satisfied cause and prejudice. Specifically, Mr. Paris asserted that appellate counsel's failure to raise obvious, meritorious issues on appeal combined with the failure to inform Paris that he had lost so that he could comply with Ohio's 90-day rule, should excuse any procedural default. On May 26, 1999, the court of appeals granted Mr. Paris' petition, vacated the March 3rd opinion, and issued a new order in its place. *Paris v. Turner*, Case No. 97-4129 (6th Cir. 1999), unreported.

The Sixth Circuit found that "cause and prejudice" existed to excuse the procedural default in Mr. Paris' case. Specifically, the court of appeals determined that it was Schuttee's ineffective representation on direct appeal and his failure to notify Mr. Paris of the adverse decision that caused Mr. Paris to miss Ohio's critical 90-day deadline for appellate ineffectiveness claims. The court of appeals determined that the filing of a five-paragraph brief, which failed to raise obvious and reversible errors, constituted both prejudice and ineffective assistance of appellate counsel. As a secondary matter, the court noted that Mr. Paris should not be blamed for any further delay beyond the initial critical delay created by Schuttee.

Thereafter, Mr. Paris' case was remanded to the district court with instructions to issue the writ of habeas corpus, giving the state a reasonable time to retry him. In compliance with the appellate court's mandate, the district court ordered the retrial of Mr. Paris. The district court specified that Mr. Paris was to be treated as if he entered custody on the date of the writ, September 22, 1999, thus invoking Ohio's statutory 90-day time limit for bringing him to trial. Ohio Rev. Code. §2945.71(E).

SUMMARY OF ARGUMENT

This Court should deny the Warden's Writ of Certiorari for four reasons. First, this case is moot as the Warden did not stay the Sixth Circuit's mandate, the district court issued a conditional writ of habeas corpus, and the time period for Ohio to retry Mr. Paris has expired. The one attempt made by the Warden to stay the mandate was made in the wrong court, voluntarily dismissed, and never renewed. Thus, this Court does not have a live case or controversy before it due to the Warden's own failed actions or inaction.

Second, this case does not involve the usage of ineffective assistance of post-conviction counsel to excuse a procedural default. Rather, as the Sixth Circuit clearly found, it was the ineffective assistance of appellate counsel, Stephen Schuttee, that excused procedural default in Respondent Paris' case. A miniscule five-paragraph appellate brief was prepared by Schuttee that missed obvious, meritorious issues. Further, Schuttee failed to inform his indigent, incarcerated client that his conviction was affirmed. The failure to convey this critical information caused Respondent Paris to miss Ohio's 90-day deadline for appellate ineffectiveness claims. The Sixth Circuit determined that filing an ineffective brief and then failing to communicate information vital to an incarcerated client so that he would know how to proceed served as prejudice and ineffective assistance of appellate counsel. The determination that ineffective assistance of appellate counsel can serve to excuse a procedural default is well-settled. *Murray v. Carrier*, 477 U.S. 478 (1986). No new law was made by this unreported decision nor does it conflict with this Court's precedent.

Third, this case simply does not involve the question propounded by the Warden. The Warden skips over the Sixth Circuit's finding that Schutee was explicitly found ineffective and instead argues that counsel for the Application for Reopening is really to blame and this counsel is post-conviction counsel. Actually, the Sixth Circuit noted counsel for the Application for Reopening as a secondary matter as the heart of the problem was Schuttee's representation or lack thereof. Once the 90-day filing deadline is missed for filing the application, it does not matter how long the applicant waited to file – it will still be denied as untimely.

Even if blame were to lay at the feet of counsel for the Application for Reopening, and it definitely does not as the time for filing the application had expired before counsel had even received a request for help, the Warden's attempt to label this counsel "post-conviction counsel" is baseless and must fail. Appellate Rule 26(B), which is Ohio's method of addressing appellate ineffectiveness claims, is clearly part of the direct appeal process, not post-conviction. Ohio has taken affirmative steps to create a unique state system and remove appellate ineffectiveness claims from the post-conviction process and further stating that they "may be appealed as of right." *Ohio v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (Ohio 1992) ("claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings"). Further, the Supreme Court of Ohio has recognized that counsel must be appointed to assist clients in the preparation of App. R. 26(B) applications. *Ohio v. Getsy*, 87 Ohio St. 3d 1471, 721 N.E.2d 117 (1999). Indeed, the Sixth Circuit has concurred with the Supreme Court of Ohio's rulings making the App. R. 26(B) process part of the direct appeal process. *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000) (application for

reopening is a continuation of the direct appeal itself). The Sixth Circuit is presumably more familiar with Ohio law. *Selvage v. Collins*, 494 U.S. 108 (1990).

Fourth, the conditioning of Respondent Paris' relief on a new trial is not a question worthy of this Court's review. It is well-settled that federal courts have broad discretion in conditioning judgment granting habeas relief. *Hilton v. Braunskill*, 481 U.S. 770 (1987).

In sum, the Warden has presented dead issues to this Court. Further, aside from the problem of mootness, this case presents no reasons to disturb the Sixth Circuit's judgment. Its conclusion that appellate counsel's representation is ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), is well-supported by the record and properly serves as cause and prejudice to excuse a procedural default.

ARGUMENT

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE WARDEN FAILED TO EVER STAY THE MANDATE ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. THUS, A CONDITIONAL WRIT OF HABEAS CORPUS ISSUED FROM THE DISTRICT COURT AND THE TIME PERIOD FOR RETRYING RESPONDENT PARIS HAS EXPIRED WITHOUT ANY ACTIVITY FROM THE STATE. THIS CASE IS MOOT.

On May 26, 1999, the United States Court of Appeals for the Sixth Circuit granted Respondent Paris relief. *Paris v. Turner*, Case No. 97-4129 (6th Cir. 1999), unreported. The court of appeals remanded Paris' case to the district court with instructions to issue the writ of habeas corpus, giving the State of Ohio a reasonable time to retry him. *Paris*, Case No. 97-4129 at 6.

In the interim, the Warden filed a request for rehearing *en banc*. On August 19, 1999, the court of appeals rejected the Warden's request for rehearing. The Warden

did not request a stay of the mandate and on August 27, 1999, the court of appeals issued its mandate.[1] Subsequently, on September 22, 1999, the district court issued a conditional writ of habeas corpus in compliance with that mandate.

In the conditional writ, the district court cited to Ohio's Speedy Trial Statute and clearly specified that the time the State of Ohio had for retrying Mr. Paris was to be calculated as if he had entered custody on the date of the issuance of the conditional writ (September 22, 1999). Conditional Writ of Chief Judge Walter Herbert Rice, Southern District, Western Division, September 22, 1999. Under Ohio law, the state had 90 days, or until December 21, 1999, to retry Respondent Paris. Ohio Rev. Code §2945.71(E).[2] Once the 90 days has lapsed, the state is prohibited from retrying him. The State of Ohio has taken absolutely no steps to retry Mr. Paris and may not do so now as the time period specified within the conditional writ has expired.[3]

The Warden did not obtain a stay of the mandate which required Ohio to retry Respondent Paris. The Warden did file a motion to stay the Sixth Circuit's mandate with the district court but this was the wrong court. Only a motion filed in the Sixth Circuit could stay the mandate.[4] The Warden voluntarily dismissed his stay action in the

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[1] If a petition for rehearing *en banc* is denied, as it was in this case, the mandate from the court of appeals must issue in seven days after the entry of the order denying the petition unless the court otherwise directs. This rule is based on the interest of minimizing unnecessary delay in the administration of justice. 6 Cir. R. 41(a).

[2] This is Ohio's "three for one" provision and for the purposes of computing time each day is counted as three so that the state has 90 days to bring an individual to trial in situations like Mr. Paris' where the time was to be "calculated as if Petitioner entered custody on the charges as of the date of this Writ (September 22, 1999)." Conditional Writ issued by Chief Judge Walter Rice, Southern District of Ohio, Western Division on September 22, 1999.

[3] The Warden has never voiced any objection to the language in the writ.

[4] 6 Cir. IOP 41(d) Stay or Recall of the mandate. A motion for stay or recall of the mandate is referred, as a single-judge matter, to the judge who authored the opinion.

district court and never filed the necessary motion in the court of appeals requesting a recall of the mandate.

With no stay of the mandate and no retrial by the State of Ohio, this case has become moot. Thus, there is no remedy available for the state at this stage that would justify granting the Warden's petition for a writ of certiorari. *Calderon v. Moore*, 518 U.S. 149 (1996) (at least a partial remedy must be available to prevent a case from becoming moot – state had partial remedy as it had actually begun defendant's second trial within the specified period before petition for writ of certiorari was granted).

II. THE APPROPRIATE DISPOSITION OF THE WARDEN'S PETITION IS A DENIAL OF CERTIORARI.

The Warden cannot claim that this case presents novel constitutional questions. In a desperate attempt to try to make the issues appear "novel," the Warden claims that another case, *Edwards v. Carpenter*, No. 98-2060, a case in which this Court held oral argument on February 28, 2000, is very similar to Mr. Paris. The Warden makes this claim even though the questions he presents for this Court's review in the two cases are entirely different. In a feeble effort to demonstrate similarity, the Warden resorts to pointing out that Judge Merritt served on the Carpenter panel and the Paris panel and that both cases involve Ohio's Appellate Rule 26(B). (Petition for Writ of Certiorari, p. 13).

Edwards is inapplicable to this case. *Edwards* addresses the issue of whether an exhausted but procedurally defaulted ineffective assistance of counsel claim can excuse the default of its attendant merit claim. The Warden has never argued that Mr. Paris' cause and prejudice arguments are procedurally defaulted and he may not do so now, for the first time, in this Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646

(1992) citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."). "These principles help to maintain the integrity of the process of certiorari." *Taylor*, 503 U.S. at 645.

Mr. Paris' case is premised on the well-settled principle that ineffective assistance of counsel on direct appeal satisfies the cause and prejudice standard where appellate counsel fails to raise obvious and reversible issues and also fails to communicate the loss of the appeal to the incarcerated client so that he can comply with a rule with a mandatory deadline. Attorney misfeasance on direct appeal can certainly serve as cause and prejudice to excuse a procedural default. *Murray v. Carrier*, 477 U.S. 478 (1986). No new law was made by this unreported case.

III. THE WARDEN MISCONSTRUES THE SIXTH CIRCUIT'S CAUSE AND PREJUDICE DETERMINATION. WHERE APPELLATE COUNSEL MISSES OBVIOUS AND REVERSIBLE ERRORS ON APPEAL AND THEN LATER FAILS TO EVER INFORM HIS CLIENT THAT HIS CONVICTION WAS AFFIRMED SO THAT HE MAY PROMPTLY PURSUE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS, A SIXTH AMENDMENT VIOLATION IS CERTAINLY PROVEN. IT IS WELL-SETTLED THAT INEFFECTIVE ASSISTANCE ON A DIRECT APPEAL AS OF RIGHT MAY SERVE AS "CAUSE AND PREJUDICE" TO EXCUSE A PROCEDURAL DEFAULT.

A. This case does not present a question of great importance or scope worthy of certiorari review.

It is important to view the decision below in the proper context. The Warden asserts that Respondent Paris' case turns on whether one has the right to effective assistance of post-conviction counsel and whether the actions of post-conviction counsel can serve as "cause" for procedural default. The Warden's assertion is wrong. Respondent Paris' case concerns the ineffective assistance of counsel that he received on direct appeal. Indeed, ineffective assistance of appellate counsel is exactly what the

Sixth Circuit found in its May 16, 1999 decision. "We have no difficulty in finding that Schuttee [appointed appellate counsel] provided ineffective assistance of appellate counsel as defined under *Strickland v. Washington*, 466 U.S. 668 (1984)." *Paris*, case No. 97-4129 at 5. It is undisputed that the right to the effective assistance of counsel extends to a direct appeal as of right and that ineffectiveness at this stage of the criminal proceedings may serve as cause and prejudice to excuse procedural default. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

B. The Court of Appeals' determination that Mr. Paris received the ineffective assistance of appellate counsel is well supported by the record.

The Warden does not contest that Mr. Schuttee rendered ineffective representation in Respondent Paris' case. Indeed, he concedes that issue as it is impossible to defend a miniscule five-paragraph brief that: 1] admits that client's guilt when he has always asserted his innocence; 2] blatantly misstates Ohio law; 3] raises a single nonsensical error; and 4] misses obvious, meritorious issues. Further, the Warden does not assert, nor has he ever, that appellate counsel communicated the affirmance of the conviction to his indigent, incarcerated client so that he could proceed and comply with Ohio's 90-day rule.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance of appellate counsel is proven where counsel fails to develop the legal issues that will allow his client to succeed on appeal. The Sixth Circuit showed, in detail, exactly why the issues missed by appellate counsel were obvious and meritorious. (Petitioner's Appendix, pp. 2a-3a). The Warden has never contested that these missed issues were not meritorious.

C. The court of appeals determination that Mr. Paris demonstrated cause and prejudice is well supported by the record.

In the present case, counsel for Mr. Paris failed to inform him that the state court of appeals had decided his case adversely against him. Mr. Paris learned of the adverse decision over four months after it issued. Further, Mr. Paris learned of the decision only because the appellate court refused his request for a copy of his trial transcript. Ironically, Mr. Paris sought a copy of his transcript so that he could supplement Schutee's five-paragraph brief with additional issues. In its entry denying Mr. Paris access to his trial transcript, the state appellate court informed him that he had already lost and that there was no appeal to supplement.

Appellate counsel has a duty to communicate critical information such as an affirmance or how to proceed with further appeals. *Boyd v. Cowan*, 494 F.2d 338 (6th Cir. 1974). *See also Office of Disciplinary Counsel v. Cox*, 58 Ohio St. 3d 124, 568 N.E.2d 1219 (1991). Recently in *Roe v. Flores-Ortega*, 528 U.S. ___, No. 98-1441, Electronic Citation 2000 WL 201148 (Feb. 23, 2000), this Court made it clear that in the vast majority of cases courts will find that counsel has an obligation to consult with a client regarding appellate rights. *Id.* at *7. Once an appeal is in place, it is imperative that the communication of critical information continues.

By failing to communicate the loss of the appeal to Mr. Paris, appellate counsel neglected, damaged and prejudiced his client as this failure placed Mr. Paris well past the 90-day filing period for filing an Application to Reopen so that he could raise his additional issues. Once the 90-day filing deadline is missed for filing the application, it does not matter how long the applicant waited to file. The applicant can be one day late

or four years late; the application will still be denied as untimely. *Ohio v. Winstead*, 74 Ohio St. 3d 277, 658 N.E.2d 722 (1996) (one-day deadline in filing because of failure of overnight courier service is not "good cause").

D. The Warden incorrectly refers to counsel at the Application for Reopening phase as "post-conviction" counsel. An Application for Reopening is not part of Ohio's post-conviction process.

Given Ohio's application of App. R 26(B), it is completely inaccurate for the Warden to assert that the Sixth Circuit utilized the "misfeasance" of what he terms "post-conviction" counsel to excuse a procedural default. Once the Office of the Ohio Public Defender received Mr. Paris' request for help it was simply too late to file a timely Application for Reopening, regardless of what counsel did from that office. It was appointed appellate counsel, not the Ohio Public Defender, that created the critical delay that prevented Mr. Paris from complying with the 90-day filing requirement. Therefore, Schuttee's ineffectiveness appropriately serves as cause and prejudice to excuse any procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Even if counsel from the Office of the Ohio Public Defender filed the application on the very day that it received Mr. Paris' request for help, the application would still have been untimely as Mr. Paris did not learn of the adverse decision until well beyond the 90-day time period.

The Warden's claim that the Office of the Ohio Public Defender served as "post-conviction" counsel is also completely inaccurate. The State of Ohio has taken affirmative steps to create a unique state system that makes appellate ineffectiveness claims part of the direct appeal process and not part of the state post-conviction process.

In 1992, the Supreme Court of Ohio made it emphatically clear that attacks on the representation of appellate counsel would not be considered if raised in a post-conviction matter. *Ohio v. Murnahan*, 63 Ohio St. d 60, 584 N.E.2d 1204 (Ohio 1992). *Murnahan*, which is responsible for the adoption of Ohio App. R. 26(B), completely banned the usage of post-conviction for appellate ineffectiveness claims. *Murnahan*, 63 Ohio St. 3d at 66, 584 N.E.2d at 1209 (claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings). With the advent of *Murnahan*, all appellate ineffectiveness claims were redirected to the Ohio Courts of Appeal and Ohio's appellate rules were to govern the litigation of all such claims, namely Ohio App. R. 26(B).

The Warden completely ignores the entire basis of the *Murnahan* decision and instead cites a miscellaneous dismissal for the erroneous proposition that an Application to Reopen is a post-conviction matter. *See Ohio v. Robinson*, 74 Ohio St. 3d 1518, 660 N.E.2d 472 (1996). Aside from the fact that *Robinson* is a miscellaneous dismissal that offers no guidance, and *Murnahan* is the seminal case governing applications to reopen, later cases have further clarified that App.R. 26(B) proceedings are part of the direct appeal process.

In early 1996, when *Robinson* was issued, the treatment of appellate ineffectiveness claims was a disaster due to conflicting rules that were still on the books. While the whole purpose of *Murnahan* was to take appellate ineffectiveness claims out of Ohio's post-conviction process, an Ohio Supreme Court Practice Rule remained that divested the appellate courts of jurisdiction to hear the claims. Former S. Ct. Prac. R. II(2)(D)(1). Thus, at the time of *Robinson*, litigants with appellate

ineffectiveness claims were being turned away from the appellate courts because the courts did not have jurisdiction and they were being turned away from the trial courts because appellate ineffectiveness claims were no longer part of Ohio's post-conviction process pursuant to *Murnahan* and App. R. 26(B). *See Ohio v. Howe*, 73 Ohio St. 3d 35, 652 N.E.2d 193 (1995); *Ohio v. Wogensthal*, 75 Ohio St. 3d 273, 662 N.E.2d 16 (1996).

Finally, in April of 1996, the Supreme Court of Ohio reaffirmed that appellate ineffectiveness claims were not part of the post-conviction process. Former S. Ct. Prac. R. II(2)(D)(1) was amended so that appellate courts would have jurisdiction to hear ineffective assistance of appellate counsel claims.

Thus, even if blame were to lay at the feet of the Ohio Public Defender, and it clearly does not because the time for filing the application had expired before the request for assistance was received, the Warden's "post-conviction" counsel assertions must fail. Counsel at the Application for Reopening phase cannot be "post-conviction" counsel as the application is a continuation of the direct appeal itself – that was the whole point of *Murnahan* and clarification between the appellate rules and the supreme court practice rules. This principle was recently affirmed in the Supreme Court of Ohio and the Sixth Circuit Court of Appeals.

In *Ohio v. Gillard*, 86 Ohio St. 3d 1448, 714 N.E.2d 400 (1999), the Supreme Court of Ohio recognized that the App. R. 26(B) procedure was part of direct appeal. In *Gillard*, Ohio had moved the court to set an execution date upon denial of Mr. Gillard's App. R. 26(B) motion. The court denied the state's motion holding that Mr. Gillard was entitled to a stay of execution to permit him to pursue his petition for writ of certiorari to

this Court. Traditionally, the Supreme Court of Ohio has granted stays of execution only to pursue a petition for certiorari after direct appeal is complete and not after the indirect or collateral review is completed. Additionally, the Supreme Court of Ohio has held that counsel should be appointed to assist with the application to reopen pursuant to App. R. 26(B). *Ohio v. Getsy*, 87 Ohio St. 3d 1471, 721 N.E.2d 117 (1999) (case remanded for the appointment of counsel "to represent appellant for purposes of an application for reopening.").

In *White v. Schotten*, 201 F.3d 743 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit concurred with the Supreme Court of Ohio's rulings making the App. R. 26(B) process part of the direct appeal. In *White*, the Sixth Circuit noted that *Murnahan* emphatically held that appellate ineffectiveness could not be a post-conviction matter and concluded because "the application for delayed consideration is neither part of a state habeas nor state post-conviction proceeding, it must be a continuation of activities related to the direct appeal itself." *Id.* at 9. This Court has repeatedly recognized that "courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (citing *Rummel v. Estelle*, 445 U.S. 263, 267 n.7 (1980)); *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 153-154 (1979).

Thus, this case involves the intricacies of a unique state court system and the ineffective assistance of appellate counsel. The Warden presents no reason to disturb the Sixth Circuit's judgment in this unreported case.

IV. THE FORM OF RELIEF THAT A FEDERAL COURT DETERMINES IS APPROPRIATE IS A DISCRETIONARY MATTER. THIS CASE PRESENTS NO REASON TO DISTURB THE SIXTH CIRCUIT'S JUDGMENT.

The second assertion offered by the Warden for this Court's review is that the Sixth Circuit had no authority to condition Respondent Paris' release on a new trial. According to the Warden, the Sixth Circuit only had the power to grant Mr. Paris a new direct appeal because ineffective assistance of appellate counsel was in issue. (Petition for Writ of Certiorari, p. 21). This argument flies in the face of this Court's precedent.

Section 2243 of the Judicial Code requires federal courts to "dispose of [habeas corpus petitions] as law and justice require." 28 U.S.C. §2243 (1994). This Court has determined that federal courts have broad discretion in conditioning judgment granting habeas relief. *Hilton v. Braunskill*, 481 U.S. 770 (1987). Indeed, "[f]ederal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief." *Hilton* at 775. "Even in 1894, ...the Court interpreted the predecessor of §2243 as vesting a federal court "with the largest power to control and direct the form of judgment to be entered in cases brought up before it on *habeas corpus*." *Hilton* at 775 citing *In re Bonner*, 151 U.S. 242, 261 (1894) (emphasis in original).

In addition to *Hilton* and §2234 of the Judicial Code, the Court in *Evitts v. Lucey*, 469 U.S. 387 (1985), made it clear that where ineffective assistance of appellate counsel is proven, conditioning a petitioner's release upon a retrial is entirely appropriate. In *Evitts*, the district court granted a conditional writ of habeas corpus, ordering respondent's release unless the Commonwealth either reinstated his appeal *or retried him*. *Evitts*, 469 U.S. at 831. The United States Court of Appeals affirmed this

relief. Subsequent to granting certiorari, this Court affirmed the decisions below, leaving the form of the conditional writ undisturbed. *Evitts*, 469 U.S. at 391, 405.

Thus, the relief afforded in Respondent's case is appropriate. Moreover, the grant of relief in this case conforms with this Court's precedent. This case presents no reason to disturb the Sixth Circuit's judgment.

CONCLUSION

This case does not present a novel constitutional question for this Court nor does its well-settled issues mirror the *Edwards* case currently before this Court. Indeed, this case involves issues that are moot, and the well settled principles that ineffective assistance of appellate counsel may serve as cause and prejudice to excuse procedural default and that federal courts have discretion in conditioning habeas corpus relief. For these all of these reasons, Respondent Paris respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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BALDWIN'S OHIO REVISED CODE ANNOTATED
RULES OF APPELLATE PROCEDURE
TITLE III GENERAL PROVISIONS

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Current with amendments received through 1/26/2000

APP R 26 APPLICATION FOR RECONSIDERATION; APPLICATION FOR REOPENING

(A) Application for reconsideration

Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of an application for reconsideration shall not extend the time for filing a notice of appeal in the Supreme Court.

Parties opposing the application shall answer in writing within ten days after the filing of the application. Copies of the application, brief, and opposing briefs shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(B) Application for reopening

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the

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application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

(C) If an application for reconsideration under division (A) of this rule is filed with the court of appeals, the application shall be ruled upon within forty-five days of its filing.

CREDIT(S)

(Adopted eff. 7-1-71; amended eff. 7-1-75, 7-1-93, 7-1-94, 7-1-97)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Amendment Note: The 7-1-97 amendment substituted "the Supreme Court" for "a court of appeals" at the end of the first paragraph of division (A) and substituted "magistrate" for "referee" in division (B)(8).

Amendment Note: The 7-1-94 amendment added division (C).

Amendment Note: The 7-1-93 amendment designated division (A); and added division (B).

COMMENTARY

Staff Notes

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shall show the date of filing time-stamped by the Court of Appeals.

Section 2. From the Board of Tax Appeals. The notice of appeal from the Board of Tax Appeals must be filed with the Supreme Court and with that board within thirty days from the date of the entry of the decision of the board and shall set forth or have attached thereto a copy of the decision appealed from and the errors complained of therein. (R.C. 5717.04.)

Section 3. From the Public Utilities Commission. The notice of appeal from the Public Utilities Commission must be filed with that commission and with the Supreme Court within the time specified in R.C. 4903.11.

The word "forthwith" as used in R.C. 4903.21, providing that upon service or waiver of notice of appeal the commission shall forthwith transmit to the Clerk of the Supreme Court a complete transcript of the proceedings, is declared by this Court to mean a period of 30 days and if at the expiration of 30 days such transcript has not been filed or a writ of mandamus requested to compel the commission to file such transcript, the appeal shall be dismissed.

Section 4. Filing Fee. A notice of appeal or of cross-appeal or a copy of a notice of appeal or cross-appeal filed in the Supreme Court shall be accompanied by a fee of forty dollars.

Section 5. Notice of Filing. Copies of a notice of appeal shall be served upon all other parties or their attorneys of record, and proofs of such service shall be filed in the Supreme Court with the notice of appeal or copy thereof.

Section 6. Designation of Counsel. The attorney registration numbers, addresses and telephone numbers of counsel for the respective parties shall be furnished to the Clerk of the Supreme Court by the party filing such notice of appeal or copy thereof at the time of its filing in the Supreme Court.

Section 7. Filing of Single Notice of Appeal. In cases where there are multiple appellants appealing from the same decision of a Court of Appeals or an administrative agency, such appellants should, whenever possible, join in the filing of a single notice of appeal.

[Rule I amended June 20, 1977; amended effective June 25, 1984; January 1, 1986; October 26, 1989.]

RULE II. DETERMINATION OF JURISDICTION ON APPEALS FROM COURTS OF APPEALS

Section 1. Effect of Failure to Comply With Required Filing of Notice of Appeal in Supreme Court. If a copy of the notice of appeal is not filed or offered for filing in the Supreme Court in compliance with Sections 1, 2, 3, 5, 6 and 7 of Rule I, the Supreme Court may refuse to accept such copy for filing or may dismiss the appeal, either on its own motion or on motion of a party, for lack of prosecution.

Section 2. Notice of Appeal Filed in the Supreme Court Considered as Motion to Certify or for Leave to Appeal. Where the order, judgment or decree of the Court of Appeals that is appealed from was rendered in an action not originating in the Court of Appeals, the copy of the notice of appeal filed in the Supreme Court will be considered as a motion for leave to appeal in a felony case or as a motion to certify in any other case. No separate motion to certify or for leave to appeal need be filed.

Section 3. Consideration as to Existence of Constitutional Question.

(A) If an appellant contends that a case involves a substantial constitutional question and also contends that such case is of public or great general interest, it is necessary to file only one notice of appeal. (See Rule I(A)(a) and (c).)

(B) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will, sua sponte, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case.

Section 4. Memorandum in Support of Claimed Jurisdiction of Supreme Court.

(A) A motion to certify, a motion for leave to appeal or a claimed appeal as of right shall be supported by a memorandum which shall contain:

(1) The same matters required in a brief on the merits (Rule V, Section 1) except that any argument should be limited to presenting with accuracy, brevity and clarity only what is essential to a ready and adequate understanding of the proposition of law to which it relates and why that proposition should be adopted.

(2) Only to the extent not indicated by such propositions of law and such argument, a concise statement of why the case is of public or great general interest, why a substantial constitutional question is involved or why leave to appeal should be granted, such statement to follow the argument.

(B) The failure of appellant to present with accuracy, brevity and clarity whatever is essential to a ready and adequate understanding of the questions requiring consideration will be sufficient reason for denying the motion to certify or for leave to appeal

or for dismissing an appeal as of right on the ground that no substantial constitutional question is involved.

Unless the "statement of the propositions of law presented" clearly states some proposition of law which could serve as a syllabus, the court may dismiss any motion or appeal sua sponte.

(C) The body of the memorandum should be confined to the minimum number of pages necessary to accurately and clearly present the reasons why the case is of public and great general interest or why leave to appeal should be granted or why a substantial constitutional question exists. The body of the memorandum shall not exceed thirty pages.

Section 5. Number of Copies and Service of and Time for Filing Memorandum. Twelve copies of such memorandum, together with proof of service of copies thereof on all other parties or their attorneys of record, must be filed in the Supreme Court at the same time that the notice of appeal is filed therein pursuant to Rule I, Section 1(B).

Section 6. Memorandum Opposing Jurisdiction of the Supreme Court. Within thirty days after the filing of the notice of appeal in the Supreme Court, appellee shall file a memorandum opposing jurisdiction. Twelve copies of such memorandum, together with proof of service of copies thereof on all other parties or their attorneys of record, must be filed at the same time that such memorandum is filed. Such memorandum shall be prepared in the same form as the appellant's memorandum, and the appellee shall state propositions of law which would support judgment in his favor. The body of the memorandum shall not exceed thirty pages. Appellee shall include in the appendix of such memorandum a complete copy of any cited statute, constitutional provision, etc., unless it is already set forth in the appellant's memorandum.

Section 7. Formal Requirements. Each memorandum filed pursuant to Sections 4, 5 and 6 of this rule must conform with the requirements of Rule VI.

Section 8. Procedure on Appeal in Felony Case Where Notice of Appeal Is Not Filed as Specified. In those cases where the time has expired for the filing in the Court of Appeals or in the Supreme Court of a notice of appeal in a felony case, adequate reasons for the delay in such filing must be given and, where based upon facts, those facts must be evidenced by affidavit or deposition filed in support of such motion for leave to appeal.

Section 9. Record Not to Be Sent to Supreme Court Until Appeal Allowed. Except in those cases originating in the Court of Appeals, and in those cases in which the death penalty has been affirmed, unless otherwise ordered and notwithstanding R.C. 2505.08, neither the original papers nor the transcript of proceedings shall be transmitted to the Supreme Court, unless and until a motion to certify the record has been granted or a motion for leave to appeal has been granted or, in the case of an appeal as of right, unless and until the court has overruled the motion to dismiss referred to in Section 3 of this rule.

Section 10. Record to Be Sent to Supreme Court After Jurisdiction Determined. Upon the allowance of a motion to certify the record or for leave to appeal or, in the case of a claimed appeal as of right, on the overruling of the motion to dismiss referred to in Section 3 of this rule, the Clerk of this Court shall issue an order to the Court of Appeals requiring the clerk of that court to prepare a transcript of the docket and journal entries in such cause in that court, upon being paid by the appellant the lawful fees therefor, and to transmit the transcript and all the papers in the case, duly certified, to the Clerk of the Supreme Court within ten days.

[Rule II amended March 1, 1979; amended effective July 16, 1990.]

RULE III. CERTIFICATION BY COURT OF APPEALS BECAUSE OF CONFLICT

Section 1. Time for Filing Copy of Order of Certification. Where the judges of a Court of Appeals have made an order finding that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another Court of Appeals and providing for certification of the record of the case to the Supreme Court for review and final determination, a party who would be adversely affected by the judgment so agreed upon shall, within thirty days of the date of such order of certification, file in the Supreme Court a certified copy of such order.

Section 2. Filing Fee. A certified copy of the order of certification filed in the Supreme Court shall be accompanied by a filing fee of forty dollars.

Section 3. Notice of Filing. Copies of such order of certification shall be served upon all other parties or their attorneys of record, and proofs of such service shall be filed in the Supreme Court with the certified copy of such order of certification.

Section 4. Designation of Counsel. The attorney registration numbers, addresses and telephone numbers of counsel for the respective parties shall be furnished to the Clerk of the Supreme Court by the party filing the certified copy of such order of certification at the time of its filing in the Supreme Court.

Section 5. Effect of Failure to Comply With This Rule. If a certified copy of the order of

Staff Commentary to Rule I
(April 1, 1996 Amendments)

Section 1

This amendment extends the certification requirements of C.P. Sup. R. 65 to appointed attorneys who represent capital defendants before the Supreme Court.

RULE II. INSTITUTION OF APPEALS; NOTICE OF APPEAL

Section 1. Types of Appeals.

(A) Appeals from Courts of Appeals.

(1) Appeals of right. An appeal of a case in which the death penalty has been affirmed for an offense committed prior to January 1, 1995, an appeal from the decision of a court of appeals under App. R. 26(B) in a capital case, or a case that originated in the court of appeals invokes the appellate jurisdiction of the Supreme Court and shall be designated an appeal of right. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S. Ct. Prac. R. VI.

(2) Claimed appeals of right. An appeal that claims a substantial constitutional question, including an appeal from the decision of a court of appeals under App. R. 26(B) in a noncapital case, may invoke the appellate jurisdiction of the Supreme Court and shall be designated a claimed appeal of right. In accordance with S. Ct. Prac. R. III, the Supreme Court will determine whether to allow the appeal.

(3) Discretionary appeals. An appeal that involves a felony or a question of public or great general interest invokes the discretionary jurisdiction of the Supreme Court and shall be designated a discretionary appeal. In accordance with S. Ct. Prac. R. III, the Supreme Court will determine whether to allow the appeal.

(4) Certified conflict cases. A case in which the court of appeals has issued an order certifying a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution invokes the appellate jurisdiction of the Supreme Court. In accordance with S. Ct. Prac. R. IV, the Supreme Court will act upon the court of appeals order.

(B) Appeals from Administrative Agencies: Board of Tax Appeals; Public Utilities Commission; Power Siting Board.

An appeal that involves review of the action of the Board of Tax Appeals, the Public Utilities Commission, or the Power Siting Board invokes the appellate jurisdiction of the Supreme Court. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S. Ct. Prac. R. VI.

(C) Appeals from Courts of Common Pleas.

An appeal of a case in which the death penalty has been imposed for an offense committed on or after January 1, 1995, invokes the appellate jurisdiction of the Supreme Court and shall be designated an appeal of right. The Supreme Court will render judgment after the parties are given an opportunity to brief the case on the merits in accordance with S. Ct. Prac. R. VI and XIX.

Section 2. Institution of Appeal from Court of Appeals.

(A) Perfection of Appeal.

(1) To perfect an appeal from a court of appeals to the Supreme Court, other than in a certified conflict case (which is addressed in S. Ct. Prac. R. IV), the appellant shall file a notice of appeal in the Supreme Court within 45 days from the entry of the judgment being appealed. The date the court of appeals filed its judgment entry for journalization with its clerk, in accordance with App. R. 22(E), shall be considered the date of entry of the judgment being appealed. If the appeal is a claimed appeal of right or a discretionary appeal, the appellant shall also file a memorandum in support of jurisdiction, in accordance with S. Ct. Prac. R. III, at the time the notice of appeal is filed. Except as provided in divisions (A)(2), (3), and (4) of this section, the 45-day time period for filing a notice of appeal and memorandum in support of jurisdiction is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal. The Clerk of the Supreme Court shall refuse to file a notice of appeal or a memorandum in support of jurisdiction that is tendered for filing after this time period has passed.

(2) (a) If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal or cross-appeal in the Supreme Court within the later of the time prescribed by division (A)(1) of this section or 10 days after the first notice of appeal was filed.

(b) A notice of appeal shall be designated and treated as a notice of cross-appeal if it is filed both:

(i) after the original notice of appeal was filed in the case;

(ii) by a party against whom the original notice of appeal was filed.

(c) If a notice of cross-appeal is filed, a memorandum in support of jurisdiction for the cross-appeal shall be filed by the deadline imposed in S. Ct. Prac. R. III, Section 4.

(3) (a) In a claimed appeal of right or a discretionary appeal, if the appellant intends to seek from the Supreme Court an immediate stay of the court of appeals judgment that is being appealed, the appellant may file a notice of appeal in the Supreme Court without an accompanying memorandum in support of jurisdiction, provided both of the following conditions are satisfied:

(i) A copy of the court of appeals judgment entry being appealed shall be attached to the notice of appeal.

(ii) A motion for stay of the court of appeals judgment shall accompany the notice of appeal.

(b) A memorandum in support of jurisdiction shall be filed no later than 45 days from the entry of the court of appeals judgment being appealed. The Supreme Court will dismiss the appeal if the memorandum in support of jurisdiction is not timely filed pursuant to this provision.

(4) (a) In a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, the appellant may seek to file a delayed appeal by filing a motion for delayed appeal and a notice of appeal. The motion shall state the date of entry of the judgment being appealed and adequate reasons for the delay. Facts supporting the motion shall be set forth in an affidavit. A copy of the decision being appealed shall be attached to the motion.

(b) The provision for delayed appeal applies to appeals on the merits and does not apply to appeals involving postconviction relief, including appeals brought pursuant to *State v. Murnahan* (1992), 63 Ohio St. 3d 60, and App. R. 26(B). The Clerk shall refuse to file motions for delayed appeal involving postconviction relief.

(c) If the Supreme Court grants a motion for delayed appeal, the appellant shall file a memorandum in support of jurisdiction within 30 days after the motion for delayed appeal is granted.

(B) Contents of Notice of Appeal.

(1) The notice of appeal shall state all of the following:

(a) The name of the court of appeals whose judgment is being appealed;

(b) The court of appeals caption and case number;

(c) The date of the entry of the judgment being appealed;

(d) That one or more of the following are applicable:

(i) The case involves affirmance of the death penalty;

(ii) The case originated in the court of appeals;

(iii) The case raises a substantial constitutional question;

(iv) The case involves a felony;

(v) The case is one of public or great general interest;

(vi) The case claims ineffective assistance of appellate counsel. [See *State v. Murnahan* (1992), 63 Ohio St. 3d 60, and App. R. 26(B).]

See Form A following these rules for a sample notice of appeal from a court of appeals.

(2) In an appeal of right, the notice of appeal shall be accompanied by a copy of the court of appeals judgment entry that is being appealed. If the opinion of the court of appeals serves as its judgment entry and is in excess of 10 pages, a copy of the cover page of the opinion may be filed in lieu of the complete opinion.

(C) Notice to the Court of Appeals.

The Clerk of the Supreme Court shall send a copy of the notice of appeal or cross-appeal to the clerk of the court of appeals whose judgment is being appealed.

(D) Jurisdiction of Court of Appeals after Appeal to Supreme Court Is Perfected.

(1) After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an application timely filed with the court of appeals pursuant to App. R. 26, or to rule on a motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution.

(2) In all appeals from a court of appeals, the court of appeals retains jurisdiction to appoint counsel to represent indigent parties before the Supreme Court where a judgment of the court of appeals is being defended by a defendant or upon remand and order of the Supreme Court that counsel be appointed in a particular case.

Section 3. Institution of Appeal from Administrative Agency.

(A) Appeal from the Board of Tax Appeals.

(1) A notice of appeal from the Board of Tax Appeals shall be filed with the Supreme Court and the Board within 30 days from the date of the entry of the decision of the Board, include a copy of the decision being appealed, set forth the claimed errors, and otherwise be in conformance with section 5717.04 of the Revised Code. See Form B following these rules for a sample notice of appeal from the Board of Tax Appeals.

(2) If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal pursuant to section 5717.04 of the Revised Code.

(B) Appeal from the Public Utilities Commission.

(1) A notice of appeal from the Public Utilities Commission shall be filed with the Supreme Court and with the Commission within the time specified in and in conformance with sections 4903.11 and 4903.13 of the Revised Code. See Form C following these rules for a sample notice of appeal from the Public Utilities Commission.

(2) If a party files a notice of appeal in the Supreme Court, any other party may file a notice of cross-appeal pursuant to sections 4903.11 and 4903.13 of the Revised Code.

(C) Appeal from the Power Siting Board.

A notice of appeal or cross-appeal from the Power Siting Board shall be filed with the Supreme Court and the Board in accordance with division (B) of this section and pursuant to section 4906.12 of the Revised Code. See Form D following these rules for a sample notice of appeal from the Power Siting Board.

Section 4. Filing of Joint Notice of Appeal.

Where there are multiple parties appealing from the same decision of a court of appeals or an administrative agency, appellants may join in the filing of a single notice of appeal.

Section 5. Caption of Appeal.

Except in appeals from the Public Utilities Commission or the Power Siting Board, an appeal shall be docketed under the caption given to the action in the court or agency whose decision is being appealed.

Staff Commentary to Rule II
(April 1, 1996 Amendments)

Section 1(A)(1) and (2)

The new language provides that only capital *Murnahan* cases are considered appeals of right. Noncapital *Murnahan* cases will be treated as claimed appeals of right, since these cases claim substantial constitutional questions. As with other claimed appeals of right, they will be considered on the merits only if, after reviewing jurisdictional memoranda, the Court decides to allow the appeal under S. Ct. Prac. R. III.

Section 1(C)

This new provision classifies as appeals of right the new death penalty appeals that will be brought to the Supreme Court under the November 1994 amendment to the Ohio Constitution.

Section 2(A)(1)

The appellant may appeal a court of appeals decision within 45 days from "entry of the judgment being appealed". The amendment defines the date of "entry of the judgment being appealed" consistent with App. R. 22(E).

48. (1983) Pursuant to RC § 2945.67(A), the state may, by leave of court, appeal any decision of a trial court in a criminal case which is adverse to the state, except the final verdict. State v. Ulrich, 17 OApp3d 179, 17 OBR 368, 478 NE2d 809.

49. (1983) In addition to those instances in which the state is provided an appeal as of right pursuant to RC § 2945.67, the state may, with leave of court, appeal any other decision of a trial court in a criminal case except the final verdict. RC § 2945.67, applied. [Northwood v. Volschow (1980), 68 OApp2d 187, overruled in part.] State v. Owen, 16 OApp3d 384, 16 OBR 452, 476 NE2d 358.

50. (1983) Pursuant to RC § 2945.67, a court of appeals is without jurisdiction to hear the state's appeal from a final verdict of not guilty with regard to a violation of RC § 4511.21, because, had appellee been convicted of the offense, his conduct would have constituted a criminal offense pursuant to RC § 2901.03. State v. Huxtable, 13 OApp3d 371, 13 OBR 453, 469 NE2d 914.

51. (1983) The double jeopardy clause does not prohibit the correction of a technically erroneous sentence. The payment of a fine, which can only be considered a discretionary, additional penalty, does not prevent the vacation of that original sentence and the imposition of a mandatory term of imprisonment for a violation of RC § 2923.17. State v. Vaughn, 10 OApp3d 314, 10 OBR 520, 462 NE2d 444.

52. (1982) A defendant is put in jeopardy where, after the jury had been sworn and evidence presented by the state, the trial court dismisses three counts of the indictment on defendant's motion for acquittal. An appeal by the state does not lie from the entry of such dismissals. State v. Lewis, 4 OApp3d 275, 4 OBR 494, 448 NE2d 487.

53. (1981) The state has a right of appeal to correct an improper sentence. State v. Howell, 5 OApp3d 92, 5 OBR 206, 449 NE2d 523.

54. (1981) Where a trial court sustains a portion of defendant's motion to suppress and the state fails to appeal that ruling pursuant to CrimR 12(J), RC § 2945.67, and AppR 4(B), the state is precluded from contesting that portion of the suppression ruling unfavorable to it in an appeal by defendant from his conviction based upon the evidence which was not suppressed. State v. Felty, 2 OApp3d 62, 2 OBR 69, 440 NE2d 803.

55. (1980) The prosecution cannot appeal an acquittal, no matter how erroneous, where jeopardy has attached. Northwood v. Volschow, 68 OApp2d 187, 22 OO3d 283, 428 NE2d 466.

56. (1976) The right to appeal is a substantive right which may be created by statute but not by rule of court. State v. Leary, 47 OApp2d 1, 1 OO3d 152, 351 NE2d 793.

§§ 2945.68, 2945.69, 2945.70

Repealed, 137 v H 1168, § 2 [GC §§ 13446-2—13446-4; 113 v 123; Bureau of Code Revision, 10-1-53; 131 v 682; 134 v H 511; 137 v H 219]. Eff 11-1-78.

These sections concerned application to file bill of exceptions, appointment of attorney, decision of the court.

Note: RC § 2945.68 is also repealed by 146 v S 2, § 2. Eff 7-1-96.

[TIME FOR TRIAL]

§ 2945.71 Time within which hearing or trial must be held.

(A) A person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within thirty days after his arrest or the service of summons.

(B) A person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:

(1) Within forty-five days after his arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

(2) Within ninety days after his arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

(C) A person against whom a charge of felony is pending:

(1) Notwithstanding any provisions to the contrary in Criminal Rule 5(B), shall be accorded a preliminary hearing within fifteen consecutive days after his arrest if the accused is not held in jail in lieu of bail on the pending charge or within ten consecutive days after his arrest if the accused is held in jail in lieu of bail on the pending charge;

(2) Shall be brought to trial within two hundred seventy days after his arrest.

(D) A person against whom one or more charges of minor misdemeanor and one or more charges of misdemeanor other than minor misdemeanor, all of which arose out of the same act or transaction, are pending, or against whom charges of misdemeanors of different degrees, other than minor misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial within the time period required for the highest degree of misdemeanor charged, as determined under division (B) of this section.

(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

(F) This section shall not be construed to modify in any way section 2941.401 [2941.40.1], or sections 2963.30 to 2963.35 of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 135 v H 716 (Eff 1-1-74); 136 v S 83 (Eff 10-17-75); 138 v S 288 (Eff 10-22-80); 139 v S 119. Eff 3-17-82.

Analogous to RC § 2945.71 (GC § 13447-1; 113 v 123(193); Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, eff 1-1-74.

The provisions of section 3 of SB 119 (139 v—) read as follows:

SECTION 3. The provisions of Sections 1 and 2 of this act apply in relation to all persons who commit any felony offense on or after the effective date of this act and to all persons who commit any felony offense prior to the effective date of this act who are not arrested in relation to the offense until a time on or after the effective date of this act.

Citation
28 USCA s 2243
28 U.S.C.A. § 2243
⊳

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Rank 1 of 1

Database
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UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 153--HABEAS CORPUS

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Current through P.L. 106-73, approved 10-19-1999

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

CREDIT(S)

1994 Main Volume

(June 25, 1948, c. 646, 62 Stat. 965.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755-761).

Section consolidates sections 455-461 of Title 28, U.S.C., 1940 ed.

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permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

[Amended April 30, 1979, effective August 1, 1979; April 29, 1994, effective December 1, 1994; April 24, 1998, effective December 1, 1998.]

6 CIR. R. 40. PETITION FOR REHEARING—EXTENSION OF TIME TO FILE

Counsel should not file motions for extension of time to file a petition for rehearing except for the most compelling reasons. If an untimely petition is not accompanied by a motion for an extension of the filing time, the petition will be returned, unfiled, to the sending party.

Committee Note

New rule. Former I.O.P. 20.1. For petitions for rehearing in death penalty cases, see 6 Cir. R. 22(c)(9). For rehearing en banc, see FRAP 35 and 6 Cir. R. 35.

[Effective December 1, 1998.]

6 Cir. I.O.P. 40. Petitions for Rehearing—When Necessary—Extension of Time

(a) When Necessary. It is not necessary to file a petition for rehearing, with or without a suggestion for rehearing en banc, in this Court as a prerequisite to the filing of a petition for writ of certiorari in the Supreme Court of the United States. A petition for rehearing is intended to bring to the attention of the panel claimed error of fact or law in the opinion. It is not to be used for reargument of the issues previously presented.

(b) Review and Disposition. Petitions for rehearing unaccompanied by a suggestion for rehearing en banc are reviewed by panel members only. If rehearing is granted, this Court will usually reconsider a case without additional briefing or argument. It may occasionally allow supplemental briefing and reargument. If a petition for rehearing is granted, this Court may make a final disposition of the case without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(c) Extension of Time or Leave to File Out-of-Time. A motion for additional time to file a petition for rehearing or for permission to file out of time is referred, as a single-judge matter, to the judge who authored the opinion. In either case, counsel should not assume that the request for additional time will be granted.

Committee Note

(a), (b)—former I.O.P. 20.1, 20.2; (c)—former I.O.P. 17.11.1. For rehearing en banc, see 6 Cir. I.O.P. 35.

[Effective December 1, 1998.]

FRAP 41. MANDATE: CONTENTS; ISSUANCE AND EFFECTIVE DATE; STAY

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate.

(1) *On Petition for Rehearing or Motion.* The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) *Pending Petition for Certiorari.*

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

[Amended April 29, 1994, effective December 1, 1994; April 24, 1998, effective December 1, 1998.]

6 CIR. R. 41. ISSUANCE OF MANDATE; STAY OF MANDATE

(a) Stay of Mandate. *In the interest of minimizing unnecessary delay in the administration of justice, the issuance of the mandate will not be stayed simply upon request beyond the time necessary for disposition of a motion seeking a stay. The mandate ordinarily will issue pursuant to FRAP 41(b) unless there is a showing, or an independent determination by this Court, that a petition for writ of certiorari*

would present a substantial question and that there is good cause for a stay.

(b) Time for Filing Motion to Stay. *A motion to stay the mandate must be received in the clerk's office within 7 days after the time to file a petition for rehearing expires or seven days from entry of an order on petition for rehearing.*

(c) Duration of Stay Pending Application for Certiorari. *A stay of the mandate pending application to the Supreme Court for a writ of certiorari shall not be effective later than the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. § 2101 or Rule 13 of the Supreme Court Rules, as applicable. If during the period of the stay there is filed with the clerk a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately.*

Committee Note

Former 6th Cir. R. 15.

[Effective December 1, 1998.]

6 Cir. I.O.P. 41. Issuance of Mandate; Stay of Mandate—Motion for Stay

(a) Issuance of Mandate. The mandate is the document by which this Court relinquishes jurisdiction and authorizes the originating district court or agency to enforce the judgment of this Court. The mandate issues 21 days after the entry of judgment or, in a civil case in which the United States or its officer or agency is a party, within 52 days after the entry of judgment, or seven days from entry of an order denying rehearing and consists of a certified copy of the original judgment, a copy of any opinion and any directions concerning costs. Copies of the mandate are distributed to all parties and the district court clerk's office. The record is then returned to the district court. In agency cases, the mandate may be enlarged or shortened by Court order.

(b) Timely Petition for Rehearing; Stay of Mandate. The timely filing of a petition for rehearing will stay the issuance of the mandate until seven days after the denial of the petition. If the petition is granted, the mandate will issue 21 days after the new ruling.

(c) Stay of Mandate Pending Application for Certiorari. The filing of a petition for a writ of certiorari does not automatically stay the issuance of the mandate. A separate application for stay of mandate must be made in the form of a motion to this Court; however, that application will not be granted automatically. Pursuant to 6 Cir. R. 41(c), if a petition for a writ of certiorari is filed during the pendency of a stay, the stay of mandate shall continue until the Supreme Court acts on the petition. The issuance of the mandate does not affect a party's right to seek a writ of certiorari or the power of the Supreme Court to grant the writ.

(d) Stay or Recall of the Mandate. A motion for stay or recall of the mandate is referred, as a single judge matter, to the judge who authored the opinion.

Committee Note

(a)—former I.O.P. 23.1; (b)—former I.O.P. 23.2; (c)—former I.O.P. 23.3; (d)—former I.O.P. 17.1.2.

[Effective December 1, 1998.]

FRAP 42. VOLUNTARY DISMISSAL

(a) Dismissal in the District Court. Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

[Amended April 24, 1998, effective December 1, 1998.]

6 CIR. R. 42. [RESERVED]

6 Cir. I.O.P. 42. [Reserved]

FRAP 43. SUBSTITUTION OF PARTIES

(a) Death of a Party.

(1) *After Notice of Appeal Is Filed.* If a party dies after a notice of appeal has been filed or while a proceeding is pending in the court of appeals, the decedent's personal representative may be substituted as a party on motion filed with the circuit clerk by the representative or by any party. A party's motion must be served on the representative in accordance with Rule 25. If the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

(2) *Before Notice of Appeal Is Filed—Potential Appellant.* If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative—or, if there is no personal representative, the decedent's attorney of record—may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1).

Office of the Ohio Public Defender
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DAVID H. BODIKER
State Public Defender

March 20, 2000

Clerk of Courts
Supreme Court of the United States
One 1st St.
Washington, DC 20543

Re: Laurence Mack, Warden v. David L. Paris
No. 99-1184

Dear Clerk:

Enclosed please find the original and 10 copies of RESPONDENT PARIS' BRIEF IN OPPOSITION, Motion for Leave to Proceed Informa Pauperis and Affidavit of Indigency to be filed in the above referenced case. Please return the extra date stamped copies to me in the enclosed self-addressed, postage prepaid envelope.

Thank you for your consideration in this matter.

Sincerely,

Angela Miller
Assistant State Public Defender

AM:gg

Enclosure

RECEIVED
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 99-1184

In the Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

-vs-

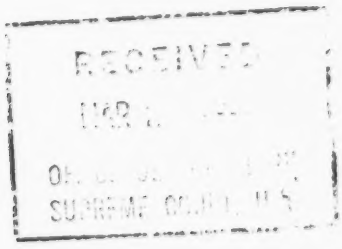
DAVID L. PARIS,
Respondent.

CERTIFICATE OF SERVICE

I, Angela Miller, a member of the Bar of this Court, hereby certify that on this 20th day of March, 2000, a copy of the foregoing RESPONDENT PARIS' BRIEF IN OPPOSITION, MOTION FOR LEAVE TO PROCEED INFORMA PAUPERIS, AND AFFIDAVIT OF INDIGENCY was deposited in a United States Mail Box, first class, postage prepaid, pursuant to Rule 29.3, to Edward B. Foley, State Solicitor, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215. I further certify that all parties required to be served have been served.

ANGELA MILLER
Counsel of Record

COUNSEL FOR RESPONDENT



Supreme Court, U.S.
FILED
MAR 30 2000
CLERK

No. 99-1184

In the Supreme Court of the ~~United States~~

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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13RP

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In the Supreme Court of the United States

LAURENCE MACK, WARDEN,
Petitioner,

v.

DAVID L. PARIS,
Respondent.

REPLY BRIEF FOR THE PETITIONER

The State of Ohio seeks review of a Sixth Circuit decision that allowed the misfeasance of a prisoner's state post-conviction counsel to excuse the prisoner's procedural default of a habeas claim. According to the court of appeals, the failure of prisoner David Paris's original appellate lawyer to "communicate to his client how to proceed with further appeals" once Paris's first-appeal-of-right was finished, and the additional three-year delay by Paris's post-conviction counsel in filing Paris's state post-conviction claim, together excused his failure to comply with Ohio's 90-day deadline for raising a post-conviction claim in the State's courts. Pet. App. at 5a-6a.

That decision runs counter to the deference federal habeas law has long shown to state procedural rules, and is not supported by this Court's decisions or the decisions of other federal courts. Yet respondent Paris claims in his brief in opposition that the question presented is moot, Br. in Opp. at 7-9, and he argues that the decision below is consistent with "well settled principles." *Id.* at 10, 18. He is wrong.

First, Paris suggests that the case is moot, because the court of appeals granted a conditional writ of habeas corpus on May 26, 1999, and the State has neither secured a stay of that judgment nor retried him. Yet as we explained in the petition for certiorari, Pet. at 12 n.2, respondent Paris was paroled in 1998, and so was not in custody when the conditional writ was issued the following year. Nothing in the opinion of the court of appeals (or in the district court's later order setting a retry-or-release-by date in conformity with that opinion) either bars the State from retrying Paris after he is released, or sets a date by which such a post-release retrial must begin. The two federal courts' orders – just like virtually every order granting conditional relief in a federal habeas case – simply barred the State from continuing to hold Paris in custody after a specified period of time. We have of course complied with the courts' orders, for respondent Paris has long since been released from custody.

But once a federal court orders a prisoner's conditional release, the State is entitled to "rearrest and reprosecute the prisoner" even after complying with the release order. *Foster v. Lockhart*, 9 F.3d 722, 727-28 (8th Cir. 1993). *See generally* James S. Liebman and Randy Hertz, *Federal Habeas Corpus Practice and Procedure*, Vol. 2, §33.3 at 1379 (3rd ed. 1998). The court of appeals' granting of the habeas writ in this case, like the district court's setting of a date for Paris's release or retrial, simply compelled Paris's release by some fixed date if his new trial had not begun by then. Because Ohio still is entitled to retry Paris on the original indictment today – though we think the court of appeals erred in ordering such a retrial, and so have sought certiorari here with the goal of avoiding that burden –

this case is certainly not moot. *See Carter v. Rafferty*, 781 F.2d 993, 998 (3rd Cir. 1986) (affirming grant of unconditional release without a stay, but explaining that the State was free to retry the prisoner and to deal with him "as the State would deal with any other State prisoner who has yet to stand trial" including rearresting and detaining him prior to trial); *Gardner v. Pitchess*, 731 F.2d 637, 640 (9th Cir. 1984) (district court's order in a habeas case dismissing the state-court criminal charges with prejudice was overbroad, as State remained free to retry the prisoner even after habeas writ had issued); *Capps v. Sullivan*, 13 F.3d 350, 352-54 (10th Cir. 1993) (except in rare habeas case where retrial is barred entirely, State is free to rearrest and reprosecute prisoner released pursuant to conditional release order); *Moore v. Zant*, 972 F.2d 318, 320 (11th Cir. 1992) (same), *cert. denied*, 507 U.S. 1007 (1993).

Second, Paris points to "the well-settled principle" that "[a]ttorney misfeasance on direct appeal can certainly serve as cause and prejudice to excuse a procedural default." Br. in Opp. at 10. But that principle – one that we ourselves cited in the petition, Pet. at 15, and certainly do not dispute – hardly resolves this case, where Paris's attorneys missed state-court deadlines *after* his first-appeal-of-right was *finished*. It was those post-appeal errors that Paris offered (and the Sixth Circuit accepted) as his cause for his state-court procedural default of his federal habeas claim – not "[a]ttorney misfeasance on direct appeal" as his brief now suggests.

We do not (at least in this Court) question Paris's claim that his lawyer in the direct appeal performed poorly, but the question presented here has nothing to do with the

strength or weakness of the "miniscule five-paragraph brief" that Paris's lawyer filed in his direct appeal. Br. in Opp. at 11. Had Paris complied with Ohio's deadline for attacking the effectiveness of that lawyer's work, Paris may very well have secured post-conviction relief in state court. But the issue here – as in the Sixth Circuit – is whether attorney errors committed *after* the completion of a prisoner's first-appeal-of-right (whether by the original appellate lawyer himself or by other counsel) can excuse the prisoner's failure to comply with state post-conviction deadlines. Certainly Ohio's highest court does not accept that excuse (and did not do so in Paris's case, Pet. App. at 44a-45a), and no federal court of which we are aware – other than the Sixth Circuit – has ever held that *those* errors (committed when the prisoner no longer has any Sixth Amendment right to counsel) should be treated just like attorney errors committed during the course of the first-appeal-of-right itself (when the prisoner no doubt *is* entitled to the effective assistance of counsel).

Paris insists that any attorney error that caused him to miss *by three years* the Ohio deadline for raising an ineffective-assistance-of-appellate-counsel claim was not the fault of "post-conviction counsel," (as we claim), but rather was the error of his "appointed appellate counsel," who failed to tell Paris about the result of his first-appeal-of-right. Br. in Opp. at 13. Yet that lack of communication from Paris's original appellate lawyer only explains the first few months of his long delay, for Paris acknowledges learning about the decision some four months after the state court of appeals acted. Any delay from that point forward surely was not the fault of the appellate lawyer, whose Sixth Amendment obligation to represent Paris adequately in the direct appeal had ended months before, when the case was submitted.

And while we agree with Paris that his appellate lawyer in the direct appeal *ought* to have told him about the state court of appeals' 1992 opinion affirming Paris's conviction, that lawyer had no *legal obligation* under the Sixth Amendment to do so.[1] Paris was entitled to have a constitutionally-effective lawyer present his first-appeal-of-right to the Ohio court of appeals in 1991 and 1992 after his trial, but once the court of appeals issued its decision in that appeal, the lawyer's act of telling or failing to tell Paris about the result of that appeal certainly could not have affected the outcome of that by-then-already-completed first-appeal-of-right. As the Court explained in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), a criminal defendant's Sixth Amendment right to counsel is only prejudiced when "but for

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[1] Paris's suggestion that his original appellate counsel was required by the Sixth Amendment (rather than by the lawyer's ethical duties alone) to tell him about the state appellate court's decision in his first-appeal-of-right, or to tell him how to proceed with further discretionary appeals or post-conviction challenges thereafter, Br. in Opp. at 12, is not supported by the cases he cites or by any other decisions of which we are aware. The appellate decision that he cites, *Boyd v. Cowan*, 494 F.2d 338 (6th Cir. 1974), has nothing to do with a lawyer's duty to notify a client about the *results* of an appeal, for there the prisoner's lawyer failed to file a notice of appeal once the prisoner was convicted in the state trial court, just as was true in *Roe v. Flores-Ortega*, 120 S. Ct. 1029 (2000) (holding that counsel's failure to file a notice of appeal to initiate the first-appeal-of-right is not *per se* deficient). Those cases tell us nothing about any right to the effective assistance of counsel *after* a state court of appeals resolves a prisoner's first-appeal-of-right, and the Sixth Circuit's view that Paris had such a right appears to have no support in the Sixth Amendment or in any other decision interpreting that provision.

counsel's unprofessional errors, the result of the proceeding would have been different." Nothing that the lawyer did or did not do *after* the state court of appeals issued its decision in Paris's first-appeal-of-right could have influenced that decision, and it is only those after-the-fact errors – committed by both Paris's original appellate lawyer in 1992, and by the lawyers in the state public defender's office who represented him during post-conviction proceedings in Ohio's state courts – that Paris (like the Sixth Circuit) points to as the "cause" for his failure to comply with Ohio's deadline for raising a post-conviction claim of appellate attorney ineffectiveness.

The focus on *when* the attorney errors occurred matters, of course, because the errors of counsel can serve as cause for the procedural default of a habeas claim only if those errors themselves amounted to a Sixth Amendment violation that the federal habeas court can address. *See Coleman v. Thompson*, 501 U.S. 722, 754 (1991) ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as [*Murray v.*] *Carrier*, [477 U.S. 478, 490 (1986)] says explicitly."). And as we explained in the petition, this Court and lower federal courts have repeatedly held that a state prisoner has no Sixth Amendment right to counsel once the first-appeal-of-right is finished. Pet. at 16-19. Those are the "well settled principles" underlying this case, and it is only the judgment below that misapplied them. The court of appeals overlooked a state procedural bar that ought to have precluded federal habeas review of Paris's defaulted claim, and did so by labeling as the cause for that default the errors committed by Paris's lawyers *after* his right to counsel had ended.

In casting all blame for his state-court procedural default on the silence of his original appellate lawyer after the first-appeal-of-right ended in 1992 – a silence that, he claims, caused him to miss Ohio's 90-day period within which state prisoners must raise any challenges to the performance of their first-appeal-of-right lawyers – Paris surely overlooks the impact of his post-conviction lawyers' additional three-year delay once he learned that he had not succeeded in that first-appeal-of-right. When Ohio prisoners show "good cause" for missing the 90-day deadline, they may file a late ineffective-assistance-of-appellate-counsel claim. Ohio App. R. 26(B) (Pet. at 3). As the district court and magistrate judge who dismissed Paris's habeas petition explained, Pet. App. at 24a, 30a, had Paris (with or without the help of his busy post-conviction lawyers) promptly filed such a claim in 1992 once he learned that he had lost the direct-appeal-of-right in March of that year, Ohio's state courts very likely would not have treated the claim as defaulted, and therefore would have reached the merits of Paris's ineffective-assistance claim.

But instead, Paris and his overworked lawyers waited three more years before filing the ineffective-assistance claim, and it was *that* additional and unnecessary delay that the Ohio Supreme Court cited in finding that Paris had defaulted on the claim. Pet. App. at 44a-45a (declining to reach the merits of Paris's claim, and citing an earlier Ohio Supreme Court decision that held that post-conviction counsel's heavy workload was not "good cause" for failing to file a timely ineffective-assistance-of-appellate-counsel claim in Ohio). By overlooking that default when Ohio's courts did not, the Sixth Circuit ignored the independent and adequate state ground on which the state courts' decisions rested, and

the Sixth Circuit did so by erroneously relying on a claim of attorney error to excuse that default, even though those attorney errors occurred at a time when Paris had no Sixth Amendment right to counsel at all.[2]

Nothing that Paris says about Ohio's handling of ineffective-assistance-of-appellate-counsel claims undercuts our argument that the judgment below is inconsistent with *Coleman*. Pet. at 15-17. The Ohio Supreme Court decision that he touts – *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992) – predates the current version of Ohio App. R. 26(B). That rule, Pet. at 3, adopted in 1993, directs state prisoners to file all post-conviction challenges to the effectiveness of their appellate lawyers in the Ohio court of appeals, rather than the State's trial courts like all other post-conviction claims. But nothing in *Murnahan* or in any of the Ohio Supreme Court's other decisions or rules suggests that the Rule 26(B) process is anything other than what that court has repeatedly said it is: a "civil, post-conviction matter."

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[2] Paris's argument that "it d[id] not matter how long" his post-conviction lawyers waited before trying to raise the ineffective assistance claim after the 90-day deadline had passed, Br. in Opp. at 12, misstates Ohio law. *See State v. Fox*, 83 Ohio St. 3d 514, 516, 700 N.E.2d 1253, 1254 (1998) (where a prisoner should have filed his ineffective-assistance claim in 1992 after he lost his first-appeal-of-right then, he nonetheless had "good cause" for failing to do so from 1992-1995 because the same appellate lawyer continued to represent him during those years, but once the Ohio public defender took over the case, attorneys from *that* office could not show "good cause" for an *additional* three-year delay in filing the prisoner's ineffective-assistance claim); *id.* ("Good cause can excuse the lack of a filing only while it exists, not for an indefinite period.").

State v. Robinson, 74 Ohio St. 3d 1518, 660 N.E.2d 472 (1996); *State v. Lanham*, 74 Ohio St. 3d 1453, 656 N.E.2d 948 (1995). Ohio courts have never treated the Rule 26(B) process as "part of direct appeal" as Paris claims, Br. in Opp. at 15, and indeed, according to the language of the rule itself, a prisoner's challenge to the work of his appellate lawyer can only begin after "journalization of the appellate judgment." Pet. at 3.[3] And, consistent with the Sixth Amendment and with *Pennsylvania v. Finley*, 481 U.S. 551 (1987), Ohio provides counsel to prisoners in their direct appeals, but not in the Rule 26(B) process, where the misfeasance by Paris's current lawyers took place.[4]

As the 16 amici States supporting our petition have explained, the first question presented is a particularly important one for the States. The court of appeals' approach – one likely to play out in many other habeas cases whenever

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[3] As Paris notes, after we filed the petition for certiorari in this case, the Sixth Circuit issued a decision describing Ohio's App. R. 26(B) process as "a continuation of activities related to the direct appeal itself." *White v. Schotten*, 201 F.3d 743, 752 (6th Cir. 2000). Whether Ohio's courts would agree with that view or not, the court of appeals' view in this case – that the heavy workload of post-conviction counsel can serve as cause for a prisoner's procedural default – is certainly not limited to any one State's rules, and is not at all consistent with the decisions of other federal courts.

[4] The *Gillard* and *Getsy* cases that Paris cites are both capital cases, unlike this case. Br. in Opp. at 15-16. Ohio, like other States, provides counsel to prisoners on death row during state post-conviction proceedings, but that fact alone neither requires the States to provide counsel to *all* prisoners in post-conviction proceedings, nor converts those proceedings into part of the first-appeal-of-right process.

state prisoners point to the errors or heavy workload of post-conviction counsel as the cause for state-court procedural defaults – is not consistent with this Court's decisions in *Carrier*, *Coleman* or *Finley*. The judgment below marks a sharp break from this Court's habeas decisions of the last thirty years, and it undercuts the important interests in federalism and comity that ought to guide federal courts whenever they undertake review in habeas of a federal claim that a State's own courts did not reach. Whether the judgment below is vacated and the case remanded for further proceedings in light of the Court's pending decision in *Edwards v. Carpenter*, No. 98-2060, or reversed and remanded for further consideration consistent with the Court's previous decisions in *Carrier* and *Coleman*, the Court should not let the Sixth Circuit's error stand.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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